IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

No. 336.

BERNARD CALLAGHAN, ANDREW CALLAGHAN, ANDREW P. CALLAGHAN AND SHELDON A. CLARK,
Appellants,

vs.

EUGENE B. MYERS,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE.

GEO. W. KRETZINGER,
COUNSEL FOR APPELLEE.

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STATEMENT OF THE PLEADINGS.

It is adjudged in the decree appealed from in this case, that appellants infringed the copyright of appellee in volumes 32 to 46 inclusive, of the reports of the Supreme court of the State of Illinois, and damages were decreed against appellants for such infringement. Appellee in his bill charging infringement, avers that he and one Horace P. Chandler, under the firm name of E. B. Myers & Chandler, were residents of the Northern district of Illinois, and that in the month of August, 1865, the firm became and were proprietors of a book or work which had not then been published, entitled, "Report of Cases at "Law and in Chancery, argued and determined in the

"Supreme Court of Illinois. By Norman L. Freeman, "counsellor at law. Volume 32, containing the remainder "of the cases decided at the April Term, and a part of "the cases decided at the November Term, 1863," said book or work being generally known as "32d volume of "Illinois Reports," and as such proprietors this firm desiring to secure a copyright upon this book or work pursuant to the statutes of the United States in such cases made and provided, before the publication of said book deposited in the office of the clerk of the District court of the United States, for the Northern district of Illinois, a printed title of said work, and afterwards on the 17th day of January, 1866, in accordance with law, and within three months of publication thereof, deposited in said office a copy of this work.

And appellee shows by like averments and in like manner said firm became the proprietors and secured copyright to volumes 33, 34, 35, 36, 37 and 38 of Illinois Reports, giving the dates respectively when they became such proprietors, and deposited the title and copy of said work in the proper office as the law requires.

That said firm of Myers (appellee) and Chandler purchased from said Freeman, all his proprietary right in all of said books, and paid him a large, valuable consideration therefor, and for his labor and care in the preparation thereof, and using the labor and matter of Freeman in publishing these books, and in consideration of said payment, Freeman agreed that complainant (appellee) and his partner should have the copyright of all of said books or works, and said firm divided said decisions and matter accompanying them into volumes, and divided and arranged each of said volumes into pages, and published a large number, to wit: over 1,500 copies of each of said volumes.

That June 13, 1868, said Chandler sold and assigned to complainant (appellee) all his right, title and interest in these books and copyright by written assignment, which was duly acknowledged, delivered and filed for record in the office of the clerk of the District court of the United States, for the Northern district of Illinois, on the 18th day of June, 1868, and there duly recorded in the copyright records of said court in volume number 3, pages 407 and 408, and alleges by virtue of this assignment he (appellee) became the sole proprietor of the copyright of all of said books, and he alone was and is authorized to publish the same.

That June 10, 1868, complainant, who was then and has ever since been a resident of the Northern district of Illinois, was the sole proprietor of a book or work which had not then been published, entitled "Reports of "cases at law and in chancery argued and determined "in the Supreme Court of Illinois. By Norman L. "Freeman, counsellor at law, 39, containing the "remaining cases decided at the November term, 1865, "those decided at the January term, 1866, and a few "omitted cases decided at the April term, 1864," and since known as "39th volume of Illinois Reports;" that as such proprietor, complainant, desiring to secure copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said book deposited in the office of the clerk of the District court of the United States for the Northern district of Illinois, a printed copy of the title of the same, and afterwards, June 12, 1868, pursuant to law, and within three months of the publication thereof, deposited in said office a copy of said work.

And by like averments appellee charges he became

and was proprietor of volumes 40, 41, 42, 43, 44, 45 and 46 of the Illinois Reports, and as such took proper and necessary steps pursuant to law to secure the copyright of said volumes and each of them respectively at the dates shown; and charges that each and all of said works (volumes) were prepared by Norman L. Freeman, and each of them contained a large amount of matter original with Freeman; that each of said books contained a great number of decisions and opinions of the Supreme court of Illinois, and among other original matter accompanying each case, Freeman prepared a syllabus or head-notes, and that for many of the cases in each of said volumes he prepared a statement of the facts of the case; also, in many of them he copied and arranged the instructions ruled upon by the court below, and in many he gave the errors assigned, and the stipulations which had been made therein, and prepared with great labor for each of said volumes a table of cases cited therein, also table of cases decided and other original matter, and all said matter was so arranged by Freeman in connection with said decisions as to make each of said books and the matter therein contained convenient and valuable to the persons using such decisions.

That complainant (appellee) purchased from Freeman all his proprietary rights in all of said books—volumes, numbered 39 to 46, both included—and paid him a large valuable consideration for his labor and care in the preparation thereof, and using the labor and matter of said Freeman in publishing said books, and by agreement with Freeman, complainant was entitled to the copyright of said books, and complainant divided said decisions and the matter accompanying them into volumes, and divided and arranged each of said volumes into pages and pub-

lished a large number, to wit: over fifteen hundred copies of each of said volumes; that complainant has printed and sold a large number of each of said volumes; that he has never sold any interest or share in the copyright of said books or works, or either of them, or authorized any one to publish any of them, and still has the exclusive right to publish all of said books, including as well those copyrighted by Myers & Chandler as those copyrighted by complainant; that about July, 1877, complainant reprinted said volumes, numbered 37 and 38. made some changes in the arrangement in the paging of said books, and that before publishing the same in accordance with the act of Congress deposited in the office of the librarian of Congress a copy of the printed title of each volume; said copies were so deposited July 20, 1877, and afterwards July 28, 1877, complainant within one month of publication thereof deposited in said office two copies of each of said works as reprinted; that for the labor, care and work done by Freeman in the preparation of all of said books said firm of Myers & Chandler and complainant paid a large valuable consideration to Freeman, and complainant expended great labor in the preparation of said work; that complainant sent by mail to the library of Congress at Washington, D. C., two copies of each of said books within the time required by law.

Complainant charges he had the exclusive right to the arrangement of each of said volumes, the exclusive right to publish the same, although he may not have had the exclusive right to the matter contained in the opinions of the court, yet had the exclusive right to publish the head-notes, or syllabus, and to the arrangement of the pages of said books, and the division of opinions into separate volumes, the table of cases cited, table of cases decided as

published in each book, the arrangement of the decisions as accompanied with the head-notes, stipulations, errors assigned and instructions as aforesaid, table of cases cited, table of cases reported and index accompanying the same, and exclusive right to all said works except to the matter contained in the opinions of the judges; that defendants had full knowledge of said exclusive rights, and attempted to buy the same from complainant, but refused to pay the price asked by complainant, and thereupon defendants proceeded to reprint and publish said volumes numbered 32, 33, 34, 35, 36, 37 and 38, and in making such republication defendants have used the decisions of the Supreme court of Illinois only as published by complainant, and have prepared said books from the books of complainant, and did not procure the matter for the same from original sources, and in all said books have used said works of complainant, and have copied the title pages thereof, and have used the division and arrangement of complainant in volumes and the paging thereof; that defendants have copied table of cases cited, table of cases reported, from each of said books of complainant; also copied from same stipulations, errors assigned, and instructions given by the courts, and in publishing statements of cases and in preparation of syllabi, defendants used said books of complainant, and the changes they made therein are merely colorable, made only for the purpose of avoiding complainant's copyright; that said books as printed and published by defendants, all and each, are merely imitations of complainant's volumes, corresponding in number, as will fully appear upon examination and comparison of said books.

Complainant charges each republication of defendants is a piracy on complainant's copyright; that said books

were made by defendants to take the place of, and as far as they can, to supersede complainant's books, and defendants are selling them to persons who would otherwise buy complainant's books, to his great damage; that defendants threaten also to republish the other said volumes copyrighted by complainant, namely, volumes numbered 39, 40, 41, 42, 43, 44, 45 and 46, and said republications will cause great damage to complainant and be in gross violation of his rights; charges that the aggregate value of complainant's copyright is not less than $20,000, and his damage for violation of said copyright is not less than that sum; prays for perpetual injunction to restrain defendants from publishing or selling or offering for sale, etc.; also that said books so published by defendants may be decreed forfeited to complainant, and defendants be required to deliver the same to complainant, and to render an account, etc.

Defendants (appellants) answer that as to the volumes 32 to 38, inclusive, they have no knowledge or information sufficient to form a belief as to the proprietorship of complainant therein, and require proof thereof; admit that printed copy of title page, volume 32, was filed as averred, before publication; admit that January 17, 1866, printed copy of said work was deposited with the clerk as averred, but deny that the deposit was within three months after publication; deny printed copy of title, volume 34, was filed as averred; aver it was not filed in advance of publication as the law required, therefore deny that the copyright to volumes 32 and 34, or either of them, is valid. As to volumes 33 and 35 to 38, inclusive, defendants answer they have no knowledge as to whether title pages thereof were deposited in advance of publication as averred, or as to whether printed copies thereof were depos-

ited in the clerk's office within three months after publication as averred, and require strict proof thereof; admit each of said volumes was prepared by Freeman, but deny that any of them contain a large amount or any considerable amount of matter original with Freeman; deny he prepared statements of fact for many cases in said volumes; aver that but a small amount of original matter was prepared by Freeman for any of said volumes, that but few statements of cases were prepared by him, those, however, were drawn by him from opinions of the court in cases reported; deny he prepared any table of cases, or so arranged decisions and matters in said volumes contained as to make the same convenient, etc.; have no knowledge as to the purchase of Freeman's right in and to said volumes as averred; no knowledge that Chandler in June, 1868, or at any time, sold his interest to complainant as averred.

As to volumes 39 to 46, inclusive, defendants answer they have no knowledge as to the steps taken by complainant to acquire copyright thereto, therefore said averments are not denied, but strict proof required; admit volumes 39 to 46, inclusive, were prepared by Freeman; deny they contain a large amount, or any considerable amount of matter original with Freeman, or that he prepared statements of fact for many cases, and aver but a small amount of original matter was prepared by Freeman, but few statements of cases were prepared; deny he prepared any table of cases for either of said volumes, or arranged the decisions and matter therein as to make the volumes convenient or of value. No knowledge that Freeman sold his rights to said volumes, or received the consideration therefor as averred; no knowledge as to how many volumes complainant sold, or as to what profit, or

whether he sold any interest or share in his copyright therein, or authorized anybody else to publish the same; deny complainant has the exclusive right to publish all or any of said books as alleged, and aver that the same and each and all matters and things therein are public and common property, forming part of the law of Illinois, and as such are not susceptible of copyright or in any manner a literary property in which a private citizen can have a monopoly under the act of Congress regulating the subject of copyright; that whatever Freeman did as alleged in the premises, was done by him in his official capacity as reporter, as a public officer, by virtue of the laws of Illinois, and all labor, literary or otherwise, he may have given said volumes in such capacity as official reporter, is public and common property, and of these averments defendants claim the same benefit and advantage as if specially pleaded; have no knowledge of the consideration paid by complainant to Freeman for volumes 39 to 46, inclusive; deny complainant had exclusive right to the arrangement of said volumes, or any of them, or exclusive right to publish the same, or to publish the head-notes or syllabi, or to the arrangement of the pages, divisions of opinions into separate volumes, the table of cases decided as published in each book, or to the arrangement of the decisions as accompanied with head-notes, stipulations, errors assigned, instructions, table of cases reported, index, or the exclusive right to said volumes as an entirety, or to any of said elements in these productions mentioned, either singly or in combination with either or all of such other elements, and deny any knowledge of any such exclusive right of complainant as alleged.

Admit negotiations with complainant concerning purchase of his interest in volumes 39 to 46, inclusive, consist-

ing of stereotyped plates, printing stock of said volumes held by complainant, and in such negotiations complainant proposed to sell his pretended copyright in volumes 32 to 46, inclusive, but no price of value was ever attached by either party to said pretended copyright. It was always treated as a mere incident to the proposed sale; admit republication of volumes 32 to 38, inclusive, and admit in making such republications they used the opinions of the Supreme court of Illinois as published by complainant, but aver they made corrections therein by correcting errors in names, citations and other matters therein contained, but deny they prepared the books for republication from complainant's, or used complainant's work as charged, except so far as complainant's books are free to any and all presons; that said republished volumes contain large amounts of new and original matter not contained in complainant's volumes; deny that complainant ever had any literary property or copyright in any of said volumes, and if he had, defendants deny the republished volumes are piracies upon complainant's copyright; admit they had considered the republication of volumes 39 to 46, inclusive, but deny having published any, and even if the same were undertaken or carried out by defendants, deny it would cause any damage to complainant or violate any of his rights; aver that for many years prior to filing his bill of complaint, complainant had abandoned volumes 32 to 38, inclusive; that his stereotyped plates were destroyed October, 1871, and none of said volumes were ever reproduced by complainant until about July, 1877, when he reprinted volumes 37 and 38, as defendants are informed; that defendants notified complainant that they proposed to republish volumes 32 to 38, inclusive, and that complainant knew the same was being done during the spring and

summer of 1877, and complainant in no manner objected to such republication, wherefore defendants insist complainant is estopped.

Thereafter (transcript 38) appellee (complainant) filed his supplemental bill, averring therein that since the filing of the original bill, defendants, in violation of complainant's rights in the premises, published and sold large numbers of each of said volumes from 39 to 46, inclusive. Complainant then charges piracy and appropriation of the order, arrangement and original matter of said volumes, by defendants, as charged in the original bill, of volumes 32 to 38, inclusive.

Defendants' answer to said supplemental bill discloses substantially the same grounds of defense as to said volumes numbered 39 to 46, inclusive, as set forth and stated in their answer to the original bill as to volumes 32 to 38, inclusive, and likewise as in the original answer defendants insist that complainant has not and cannot have, under the act of Congress, concerning copyrights, or otherwise, any copyright or property in the opinions of the court, etc.

Counsel follows his abridgement of the pleadings with an extended statement of what he calls a summarized "history of defendants' publication of the volumes in question." We will omit at this point a statement of the testimony upon which we rely, but will present the evidence from the record in the course of our reply to counsel's argument as the questions arise.

Argument for Appellee.

I.

CAN LAW REPORTS BE MADE THE SUBJECT OF COPYRIGHT?

This case involves the copyright of appellee to the volumes of the reports of the Supreme court of the State of Illinois, from 32 to 46, inclusive, and the infringement of this copyright of each of these volumes by appellants, and damages for such infringement. If the arrangement of the opinions of a court of final resort into numbered and paged volumes, each opinion being prefaced with syllabus or head-notes, statements of fact, points and authorities of the counsel respectively, instructions and assignments of error, each volume attended with a table of all the cases cited in the opinions, a table of the cases reported, an index showing the questions in alphabetical order considered, the rulings made thereon in the opinions, with a reference to such opinions by pages, all being the work of the reporter, do not bring the work within the act of Congress providing for and governing copyrights, then appellee has no standing in court, and whatever damages he may have suffered from the piracies of appellants must be borne without complaint or relief.

The first and most important question, therefore, arising upon the record of this case, is whether the reports of the opinions of the Supreme court, or a court of final resort of any state, can be made the subject of a copyright. *The bare assertion that the opinions of the court are not subject of copyright is not sufficient.*

The question cannot be so limited. The inquiry is extended from the opinions themselves to the mental labor, skill and ingenuity of the reporter in extracting from such opinions a concise statement of the points considered and decided by the court, in the preparation of a concise, and yet at the same time sufficient statement of facts to aid the practitioner or the judge to easily and accurately ascertain the controlling facts involved in the case before the court for decision, and thus to more easily and intelligibly understand the rules of law stated, and as applied by the court in its opinion and judgment. Also a concise statement of the arguments and authorities cited to the court rendering the opinion, which not only shows in part the legal information before the court rendering the opinion, but often aids the practitioner, and enlarges the benefit or use of the opinion itself.

To illustrate. Counsel has referred this honorable court to the argument of Mr. Ingersoll in the case of *Wheaton* v. *Peters*, 8 Peters, 591, saying: "The argument of Mr. Ingersoll upon this point, beginning at page 618, is a masterpiece of legal reasoning, and the court is respectfully asked to examine that argument in its consideration of the point now under discussion."

This argument of Mr. Ingersoll was not embraced in the opinion of the court; it was no part of public property, and as furnished by Mr. ~~Ingersoll~~ Wheaton it was no part of the record of the case, and was only embraced in the report with many opinions arranged and bound in one of the volumes of the Supreme court reports by the reporter. *The learned counsel fully appreciates the value and utility added to the report, in the preparation and insertion of this exhaustive argument by an intelligent and skillful reporter.* Add to the syllabus, or head-notes, the statements of fact and the briefs of counsel, the arrangement and division of the

reports into volumes, the numbering and paging of the volumes, the table of all cases cited in the opinions, and table of cases reported in each volume, the index of subjects under legal titles, considered in each opinion with reference to the opinions under each subject, by paging, all of which is the mental product and labor of the reporter, and without which the mere naked opinions of the Supreme court would remain in manuscript on file in the clerk's office, and then the labor and skill required to produce the valuable works claimed by appellee can only be realized in part.

A new treatment of an old subject, or old matter put in new form, adding greater advantages to its use, saving time in research, securing greater accuracy and quicker certainty, are inventions, so to speak, in literary or book productions, and entitle the author, under the constitution of the United States the act of Congress and the judicial construction thereof to protection by copyright.

In *Lawrence* v. *Dana*, 7 O. G., 91, held: "That new materials are certainly the proper objects of copyright, and old materials when subsequently collected, arranged and combined in a new and original form, are equally so; and in either case the plan, arrangement and combination of the materials are as fully protected by the copyright as the materials embodied in the plan, arrangement and combination."

Section 8 of article 1 of the constitution, enumerating the powers conferred upon Congress, referred to by counsel, viz.: "To promote the progress of science and useful arts, by securing, for limited times to authors and inventors the exclusive right to their respective writings and discoveries," clearly include in its general terms the work before the court. It must be borne in mind that the intelligent preparation of law reports, with accurate syllabi, head-notes, index, etc., require an accurate knowledge of the law.

It is a work especially for the legal scholar, and when done, as performed by Mr. Freeman, it does "*promote the progress of science*" in law. Literally defined "science is knowledge," but in the sense in which the word "science" is used in the constitution, it means and includes "*a systematic and orderly arrangement of knowledge.*" So, the statute of 1845 cited and quoted by counsel, providing for the appointment of a reporter, requires "the court shall appoint some person LEARNED IN THE LAW, etc.

A physician of great learning in the "sicence" of medicine, or the most acute theologian, without special learning in law, would be wholly incapable and incompetent to prepare and arrange the careful and accurate legal work claimed by appellee in this controversy.

Curtis on Copyrights, page 131: "The statements of the case and the arguments of counsel may be the subject of property in the reporter by reason of his *personal skill* and diligence in reporting them, which make them, to a certain extent, his own compositions. It was apparently upon this ground that the copyrights of the Term Reports and the Reports of Vesey, Jr., have both at different times been protected by injunction."

In *Wheaton* v. *Peters*, 8 Peters, 591, the copyright of the United States Supreme Court Reports was immediately and directly involved. Counsel denies, however, that it is authority upon this question. It was the only question involved in the case. It was most learnedly discussed by the most able and advanced lawyers in the country—Mr. Sargent, Mr. Webster, Mr. Ingersoll, Mr. Payne. Mr. Wheaton claimed copyright of his reports. The right of copyright in these reports was denied by defendant. The argument of these learned counsel in favor of and against copyright of the law reports ex-

hausted the question, and to their arguments nothing new has been added. The rights of Mr. Wheaton were urged upon two grounds—first, protection under the common law, and second, under acts of Congress. The first was fully considered by the court, and decided adversely to Mr. Wheaton. Upon the second ground the court held that:

"Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted."

The court then proceeds to an analysis of the act of Congress, and the steps required to be taken under this act to secure a valid copyright, and say (page 667):

"The construction of the acts of Congress being settled, in the further investigation of the case it would become necessary to look into the evidence and ascertain whether the complainants have not shown a substantial compliance with every legal requisite. But on reading the evidence we entertain doubts, which induce us to remand the cause to the Circuit court, where the facts can be ascertained by a jury. And the case is accordingly remanded to the Circuit court, with directions to that court to order an issue of facts to be examined and tried by a jury, at the bar of said court, upon this point, viz: whether the said Wheaton, as author, or any other person as proprietor, had complied with the requisites prescribed by the third and fourth sections of the said act of Congress, passed the 31st day of May, 1790, in regard to the volumes of Wheaton's reports in the said bill mentioned, or in regard to one or more of them in the following particulars, viz: whether the said Wheaton or proprietor did, within two months from the date of the recording thereof in the clerk's office of the District court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident states, for the space of four weeks; and whether the said Wheaton or proprietor, after the publishing

thereof, did deliver, or cause to be delivered, to the secretary of state of the United States, a copy of the same to be preserved in his office, according to the provisions of the said third and fourth sections of the said act. And if the said requisites have not been complied with in regard to all the said volumes, then the jury to find in particular in regard to what volumes they or either of them have been so complied with."

Thus the court judicially declared that the protection of Mr. Wheaton under his alleged copyright, depended solely and alone upon his having taken the requisite steps to secure the same, pursuant to the terms and conditions of the act of Congress. Had the court been of the opinion that law reports were not the subject of copyright, and that was the only issue, the sole contention, would it have stultified its judgment by remanding the case with instructions to inquire into the steps taken by Mr. Wheaton to secure that which the law did not give him, namely his copyright? But the court concludes its majority opinion as follows:

"It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."

This we concede. This we have not claimed in the pleadings or by the evidence. We do not claim a copyright of an opinion written by the Supreme court and filed with the clerk, but we claim the copyright of a book, a work of which the opinion of the court is but one of many parts, and all the parts except the opinion are original, the matter, arrangement, work and mental labor of the reporter.

Justices Thompson and Baldwin dissented. Not upon

the ground that the reporter was not an author, but from the decision of the majority which remanded the case for further inquiry. Justice Thompson in his dissenting opinion upon this point said (page 669):

"The great principle on which the author's right rests is, that it is the fruit or production of his own labor, and which may, by the labor of the faculties of the mind, establish a right of property, as well as by the faculties of the body; and it is difficult to perceive any well founded objection to such a claim of right. It is founded upon the soundest principles of justice, equity and public policy. * * * (page 698.) *Upon the whole, in whatever light this case is viewed, whether as a common law right, or depending on the act of Congress,* I THINK THE APPELLANTS ARE ENTITLED TO THE REMEDY SOUGHT BY THE BILL; and that the decree of the court below ought to be reversed, the injunction made perpetual and an account taken according to the prayer in the bill, without directing an issue to try any matter of fact touching the right."

The judgment of the *entire* court, however, was that the act of Congress providing for copyright, embraced law reports, and ordered the court below to order an issue to be made and tried as to whether Mr. Wheaton had complied with the law of Congress in securing or attempting to secure a copyright of his reports. Mr. Justice Story, as one of the justices of this court participated in the hearing and determination of *Wheaton* v. *Peters*, *supra*, and afterwards, in deciding *Gray* v. *Russell*, 1 Story, C. C. 21, said:

"In the case of *Wheaton* v. *Peters*, it was held, that the opinions of the court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work.

"The cause went back to the Circuit court for the pur-

pose of further inquiries as to the fact, whether the requisites of the act of Congress had been complied with, or not, by Mr. Wheaton. This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of argument could have been the subject of copyright, for that was all the work which could be the subject of copyright, so that if Mr. Peters had violated that right Mr. Wheaton was entitled to redress."

In *Cobbett* v. *Woodward*, Law R., 14, Eq. 407, held:

"It appears to me that a book must include every part of the book; it must include every print, design or engraving, which forms a part of the book, as well as the letter-press therein which is another part of it. PARKER V. C., *Bogue* v. *Houlsten*, 5 DeG. and Sm., 275."

The learned author Drone states at page 152, under the title of Compilations: "The doctrine is well settled in England and the United States, that existing materials selected from common sources and arranged and combined in an original and useful form, become a proper subject of copyright. This is equally true whether the compilation consists wholly of selected matter, or of such matter combined with original composition; and, in either case, it is immaterial whether the materials are obtained from published or unpublished sources, or whether the selections are used bodily, or their substance is given in the language of the compiler. Such works are often the result of industry, learning, and good judgment, and are useful and valuable contributions to knowledge. They are entitled to and will receive, the same protection extended to productions wholly original."

At page 155, Drone refers to *Banks* v. *McDevitt*, 13 Blatchf., 163, and says:

"The statutes were public property, and the use of the authorities cited was open to all persons. But the combination of the citations with the statutes was a valuable and useful work, in which copyright was held to vest."

In *Little* v. *Gould*, 2 Blatchf., 362, the copyright of the

third volume of Comstock's reports was involved. Held (364):

"That Mr. Comstock, *the reporter, is the author of the book within the meaning of the act of Congress, is a matter not to be controverted.* It was conceded throughout the case of *Wheaton* v. *Peters*, (8 Peters, 591), that Mr. Wheaton was entitled to the copyright of his reports *as author*, and the only question was whether he had secured the right by a compliance with the requisites of the statute. A majority of the court entertaining doubts upon this question, as the facts appeared before them in the record, remanded the cause, with directions to the court below to inquire whether or not these prerequisites, as determined in that case, had been complied with."

In Drone on Copyright, 144, the rule is stated:

"The copyright protects the whole and all the parts and contents of a book. When the book comprises a number of independent compositions, each of the latter is as fully protected as the whole. And so the copyright protects not only the text, but also any engravings, illustrations, figures, etc., contained in the book. The copyright will not extend to any part which is not a proper subject of copyright. But the fact that a part may not be entitled to protection does not affect the copyright in the rest. The copyright is valid to the extent of the matter which will stand all the tests of the law. 'The courts of justice,' said Lord Kenyon, 'have been long laboring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole book.'"

As stated, we do not claim that the written opinion of the court filed with the clerk could be copyrighted as such, but when the opinions are taken by the reporter and classified and bound in a book, the book and the opinions so classified and arranged by him are the proper subject of copyright.

In Morgan's Law of Literature, Vol. 2, page 565, the rule is correctly stated:

"However, if a reporter publish them (the decisions), combined with the product of any labor of his own, as if, for instance, he annotate, or abridge, or amplify them, he can copyright the work, decisions and all, as a whole. * * * Law reports, then, are to be considered, as to copyright, the same as any other literary works, except that there can be no copyright in the opinion of judges who are enjoying a salary paid by the people or the state."

Drone, at page 159, under the heading "Law Reports," says:

"The report of a law case generally consists of two parts; 1, the opinion delivered by the court; 2, the matter prepared by the reporter. The latter usually comprises the head-notes, giving a digest of the decision a statement of the facts of the case, a synopsis of the arguments of counsel, and such other matters as are sometimes added to make the report complete. It is settled, both in England and in the United States, that valid copyright may be acquired by a reporter for those parts of a report of which he is the author, or compiler."

Numerous cases are cited by the learned author in support of this construction of the law of Congress, and the acts of the English parliament in providing for and regulating copyrights.

While all may go to the "common source" for opinions, they cannot copy them from a copyrighted volume for reprint without infringing. A book secured by copyright is not an *open* "common source" to the public as to any matter it contains, although taken by the author from such "common source." Such old matter cannot be rightfully taken from the book and carried away by the second author. He can only justifiably obtain it directly

from the public fountain—the common source, where the first author found, copied and left the original. This "common source" is the work place of all. All copies by all must be taken from the public document directly, and thus avoid the *mis*appropriation of the labor of the first author. That his labor as well as his original matter are equally protected by law, will be hereafter shown.

After quoting Section 8, of Article 1, of the Constitution of the United States, counsel say of this section, that "the framers of the constitution plainly had in view the necessity of affording protection to the literary productions of private authors, and never intended that by virtue of such legislation a public officer could claim private dominion and ownership or assert a monopoly in the result of his official labors for which he was employed and paid by the state."

No such definition or limitation is found in this constitutional provision. No words appear in this section which will bear such interpretation, or permit such limited and narrow construction, but counsel assert that such construction must be given to this provision of the constitution, not because the words warrant it, but because Mr. Freeman was employed and paid by the state.

I insist, first, that the statutory appointment of Mr. Freeman as reporter, does not make his works in question the property of the state; second, he was not paid by the state for his work as reporter, or for the work as actually done, so as to make the book, *as a work, the property of the state;* third, that unless the right to the copyright is reserved to the state by express statutory provision, *it passes to the reporter.* No such reservation is contained in the statute authorizing Mr. Freeman's appointment, or is implied from the appointment.

Volume 32 was published in 1865. Mr. Freeman was then the reporter. Counsel refers to the statute of 1845, as the law under which Mr. Freeman acted as reporter during the period of time in which the reports in question occurred, and were published.

Section 20 and 21, of the statute of 1845, entitled "Courts," are as quoted by counsel, but what of the compensation to be paid under this statute to Mr. Freeman for his services as reporter?

Section 22 provides:

"It shall be the duty of the reporter to deliver to the secretary of state, as soon as convenient after publication, such number of copies of the respective volumes of the reports of said court as may be necessary to enable the said secretary to distribute the same in the manner provided in the following section, together with one hundred copies in addition, to be deposited in the secretary's office for the use of the state."

Under Section 23, the secretary is directed to distribute the reports, to wit:

"One copy to each justice of the Supreme court, one to the Attorney-General and each State's Attorney and to each clerk of a court of record, except the Supreme court, one to probate justice, five to the clerk of the Supreme court, one to the executive of each state in the United States, five copies to the executive of the United States, one to each of the officers of the executive department of this state, etc."

Section 24 provides that upon the delivery of this requisite number of any volume, the Secretary of State shall deliver to the reporter a certificate specifying the number of copies which he has received, which certificate will entitle the reporter to a warrant upon the treasurer for an amount for these volumes *at the price for which these books are sold to individuals, provided the price shall not*

exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer and secretary of state. This law was amended in 1863 as to the term of the office, and in 1863 the price of the volumes to be delivered to the state was limited to six dollars, still subject, however, to the control of the above provisions; that is, that the state shall pay for such copies "at the price for which said books shall be sold to individuals," or to be determined by the auditor, treasurer and secretary of state.

Section 20 of the Act of 1845, quoted by counsel, was unchanged by the Act of 1863 or 1865, which provides that:

"Said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk."

If this was a "use" for the state—to make property to belong exclusively to it, this provision was wholly unnecessary.

In what provision of this act is Freeman employed and paid by the state in the sense asserted by counsel?

As soon as the opinions are filed with the clerk they are turned over to the reporter that he may arrange, compile, annotate, index, etc., for publication, and the state agrees that it will take from him the actual number required by the state to furnish its own officers, and to exchange with other states and national officers, together with an additional 100 copies, and will pay him therefor the same price at which he sells the report in the market, or that may be fixed by the auditor, etc. Freeman under this law is not a salaried officer. The state pays him nothing for his official services.

If he was paid by the state, as counsel contends, it would not buy these copies from him at any price. The *entire* edition would belong to it *without purchase.*

In the case of *Wheaton* v. *Peters*, it plainly appeared that Congress provided a salary to be paid to the reporter. In the argument of Mr. Sargent with Mr. Ingersoll against Mr. Wheaton's claim, page 648 (8 Peters), he stated:

"In process of time after the publication of the first volume of his reports Mr. Wheaton became a public officer, with a salary for his labor as reporter, and obliged to perform the duties of the office. * * * It therefore became a contract on his part, for the sum allowed by the law, to prepare and publish the reports."

Mr. Webster in his argument at page 651 refers to the question of salary, as well as to the law of Congress authorizing his appointment, and says, page 651:

"The laws of Congress relating to the reporter's office do not bear on the question of copyright. There is no intimation in the statute of such an interference, or that the sum allowed the reporter is in lieu of copyright. The right in the reporter to fix the price of the volumes recognizes a right to exclude others from publishing. He receives $1,000, and gives eighty copies to the United States, of the value of $400. Would he give up the copyright for this sum, this modicum? The law was intended to secure to him the rights he possessed, and to add to them also."

Mr. Sargent made the same point here urged by counsel for appellants. Mr. Webster met the point as above stated, and the Supreme court undoubtedly adopted the reasoning of Mr. Webster, as clearly shown in its judgment, in adjudging that Mr. Wheaton was entitled to protection by copyright, if he had taken the necessary steps to secure it, notwithstanding his appointment as reporter under salary by virtue of an Act of Congress.

Counsel cited in connection with this point from the opinion of Judge DRUMMOND, (transcript 32,) which finds full support in the disposition of the same question first raised by Mr. Sargent, by the Supreme court of the United States passing the question in *silence*, although so strenuously urged by Mr. Sargent as being entirely unnecessary to consider, or not being pertinent to the determination of the real question, namely, the right of a reporter to secure to himself the future fruit of his labor by copyright, the same not being prohibited by the law under which he is appointed and acts.

Counsel quote from Mr. Drone on Copyrights, page 161, to the effect that such opinions as judicial decisions are not the subject of a copyright "by a reporter or the first publisher, on the ground of authorship, for the reason that he is not the author."

The case considered by Drone in the rule cited by counsel, is not before the court. This learned author distinguishes, as we have shown by foregoing quotations, between an *opinion* delivered by the court and "the *matter* prepared by the reporter," and this difference is the subject of copyright, and in the combination the opinion becomes a part of the copyrighted matter, so that the book containing the whole cannot be appropriated without committing piracy. Any other author or law publisher may go to the records of the Supreme court and take therefrom the original recorded opinions of the Supreme court, and publish them with his own original head-notes and annotations, under his own original arrangements and methods, if no state law prohibits the same, without infringing the copyright here contended for, but such is not the case before the court, as will be clearly shown from the evidence.

Counsel contends that "the sole test, therefore, in determining the right of private dominion and ownership in literary productions is, whether the writer is engaged in a private enterprise, and therefore an author within the meaning of the constitution, or whether he is engaged in a public service, which forever dedicates the result of his labors to the public whom he serves. If he falls within the latter class, then without exception the result of his labors, when published, becomes the property of the public."

Counsel illustrates this sweeping assertion by a reference to judges, etc. The Supreme court of this state is required by law to put its opinions in writing, and the clerk of the Supreme court is required to enter such opinions of record. Suppose there had been no reporter, as Mr. Freeman has been, and one of the judges had taken upon himself the labor of organizing these opinions into volumes, numbered and paged, with syllabi, head-notes, tables and index, such as in the books of appellee before the court, would not such judge have been entitled to a copyright to secure to him the beneficial result and financial fruit of this work? The state did not employ or pay him for this work. So in the case of a reporter, section 20 of the Statutes of 1845, quoted by counsel, provides:

"The court shall appoint some person learned in the law to minute down and make report of all the principal matters drawn out at length, with the opinion of the court in all such cases as may be tried before the said court."

These words define the full labor imposed upon the reporter in the discharge of his official duty. Could any just or reasonable construction of this language be made sufficently elastic by the most extreme implication to include and make it the employed official duty of the reporter to make head-notes, to extract and concisely state the *pith* and *gist* of the opinion in a syllabus, to abstract argu-

ments by counsel, to furnish from voluminous records a concise and yet sufficient statement of the facts to justify the opinion and judgment of the court, arrange the instructions and the assignments of error considered and reviewed by the court, to intelligibly index each opinion, and attend the whole arrangement and combination with tables of cases cited and reported. Such a construction would impose upon the official reporter a gross injustice, in compelling him to perform this complicated and difficult variety of mental and physical work not specified in any contract with the state, and all for the privilege of delivering to the state a few volumes of reports at the price at which he sells to the public, and without any protection against competition with the public. If the theory of counsel is correct, what would inevitably follow? Take the case at bar. The law under which part of this labor was performed, provided, as to the price for the volumes to be furnished the state, " at the price for which said books shall be sold to individuals." While counsel contends that Freeman was not entitled to copyright, although not prohibited by the statute under which he was acting as reporter, and with apparent seriousness argues that the opinions of the Supreme court and the work of the reporter are dedicated and belong to the public, yet he was careful to prove by the evidence of record in this case that appellants, his clients, claim copyright to Breese, and to volumes 1 to 31 inclusive of the Illinois Reports.

I will not further refer to the authorities cited by counsel, except to say that every case cited by him refers and is expressly limited to the judicial decisions of the court in the form of its written and filed opinions. I know of no reports published in the United States that are not held

by copyright. The West Publishing Company is now furnishing to the profession reports of all the decisions of the courts of final resort, state and federal, with syllabus, index, etc., complete, and each volume appears secured to the publishers by copyright.

Hodges, et al., v. *Welsh*, 2 Ir. Eq., 287, involved a motion for an injunction upon a bill to restrain the defendant from infringing the copyright of complainant of law reports. The precise question here in argument was carefully considered and determined. The master of the rolls, speaking of the first question presented, says (page 286):

"It is argued that the works of Messrs. Crawford & Dix—or to make use of a more general expression, the works published under their names—are not such literary works as give to the authors, or to any persons deriving under them, the protection which is afforded to literary productions."

As to this objection the master says:

"I cannot see any valid distinction between the work of a reporter of the decisions of a court of justice and that of any other author. It is true that he merely states matters which have occurred in public, and which any other person in the community may in like manner publish, though it would appear that formerly the permission of the judges to publish their cases was sometimes given. But the reporter bestows his time and labor on the production of the report in a proper form; he has in many instances to refer to the original documents in order to learn the facts accurately, and is, in my opinion, as much to be considered the author of the work published as the *reports of legal decisions* as the historian who records facts passing from day to day, taking many of the materials for his work, perhaps, from public documents accessible to all.

"In *Butterworth* v. *Robinson*, 5 Vesey, 706, the proprietor of the copyright in the term reports obtained an injunction against the sale of a work which purported to be an abridgement of cases at law and in equity, but which

copied, or nearly copied, cases contained in the Term Reports. Indeed, in many cases it seems to be conceded, and in my opinion it must be conceded, that there is a copyright in the author of such reports, or his assignee, which the law will recognize, and if necessary, protect. I do not think that the defendant can successfully contend that Messrs. Crawford & Dix had not originally such copyright, merely because some of the cases published by them are given *ex relatione*. Whether they had a copyright in such cases it is not necessary to determine in this case; it is sufficient to see that as to some of the cases they unquestionably had the copyright, and to repeat the observation of Lord Kenyon, in *Cary* v. *Longman*, 1 East., 359, that 'courts of justice have been long laboring under an error, if an author have no copyright in any part of a work, unless he have an exclusive right to the whole book.' "

I submit upon the foregoing authorties the question as to whether "reports" are subjects of copyright is foreclosed—no longer open for discussion. Mr. Freeman originally acquired the exclusive right to the arrangement and method of these volumes, and he determined thereby what should constitute the Illinois Reports and each volume thereof. Appellee acquired all the rights that in anywise vested in Mr. Freeman touching the proprietorship and ownership of these volumes and the matter and arrangement thereof.

The volumes here involved, cover the decisions of the Supreme court of the State of Illinois for about five years. The division and arrangement of these decisions and opinions of the court into volumes and pages, the arrangement of the matter and the selection of the part of the record in each case that should enter into its history and presentation in the report, were selected at the discretion, according to the judgment and skill of the reporter or publisher. The condensation of the points

for syllabus or head-notes and index, were in the language selected and furnished by the reporter or publisher; the entire arrangement of this matter in the form of each volume is labeled, given a number and paged to agree with the table of the cases reported and the reference to the cases in the index, and such arrangement is of itself a proprietary right, the exclusive ownership and use of which appellee secured under the act of Congress, and no one can invade his right without his consent as the law requires.

Callaghans advertised their reprints as "FREEMAN'S REPORTS." The title was clearly covered by the copyrights which appellants attempted to appropriate, and thus infringed the copyrights in this particular.

A. P. Callaghan testified, Trans., 448: "*We reprinted "this slip and changed the word 'Freeman's' to 'Illinois.'*" and put it in there, so that we are sending out our old catalogues printed before that change, as directed by Mr. High with this slip announcing this difference.

"Q. That slip there was printed and pasted on after the filing of the supplemental bill in this case?

"A. After he (Mr. High) directed us to do so."

If appellants and their counsel relied for defense upon the consent, encouragement, acquiescence, etc., why did they not insist upon the right, upon the same ground, to use the title that they did not appropriate the labor and material of the book itself.

"The plan, arrangement, or method," is the exclusive property of the one who first uses and protects it by copyright. It is not necessary that the entire matter, or even any considerable portion of the composition is original with the proprietor or party securing the copyright.

Where part of the matter is old, and part new, and the two are united, and by such union become more suitable and convenient for use, under the arrangement devised by the proprietor or publisher, he may protect his work by copyright.

Cary v. *Longman*, 1 East., 358.
Gerald v. *Houston*, 3 K. & J., 708.
Longman v. *Winchester*, 16 Ves., 269.
Mawman v. *Tegg*, 2 Russel, 385.
Curtis on Copyrights, 253.

At page 259, this learned author (Curtis) states, the principle and rule controlling compilations:

"Many persons seem to labor under the mistake of supposing that books of the character of compilations, may be used with impunity; and that, generally, where the materials made use of by an author can be traced to other sources, his copyright cannot prevent the use of those materials by others. The whole distinction in such cases which is entirely overlooked by those who set up this kind of defense, is this, that every subsequent writer has a right to resort to the common sources for the same learning, and to make use of it at his pleasure; but if he takes it from one whose book is protected by copyright, who has collected and arranged it, in a form and method peculiar to himself, and gives it out to the world in that form without resorting to the original sources, he is guilty of piracy."

In *Gray* v. *Russell*, 1 Story, 11, held:

"A party who first brings together materials drawn from different sources is entitled to a copyright for a compilation."

Emerson v. *Davies*, 3 Story, 768.

Justice Clifford, in *Green* v. *Bishop*, 1 Clifford, 199, summarized:

"Elementary writers and jurists concur that the law

does not require that the subject of a book should be new, or the materials original, in order to entitle the author to a copyright; and all appear to admit that there may be an arrangement and combination of materials, and the mode of displaying, and illustrating the subject, although all the materials employed and the subject of the work may be common to all other writers."

Drone, at page 198, defines the words "originality" and says:

"The words original and originality, as used in the law of copyright, have a most comprehensive meaning. Very few, if any, intellectual productions are original in the strict sense that the author is the creator of all that is expressed in his composition. * * *

Page 202: "A compilation of old materials gathered from published works and other common sources, is an original production within the meaning of the law."

It may be conceded that appellant had an undoubted right to take copies of the written opinions and decisions of the Supreme court filed with the clerk and publish them in a book form without infringing the copyright of appellee, but in so doing they could not use appellee's arrangement, method, division, or take from appellee's book any original matter furnished or used by the reporter or publisher *or even copy the old matter therefrom* without being liable for infringement.

II.

APPELLEE'S COPYRIGHT FOR EACH VOLUME AS ALLEGED IN THE BILL OF COMPLAINT IS FULLY ESTABLISHED BY THE PROOF.

As shown under authorities cited, to avoid infringement, the second author *must* actually take the old matter from

the "*common source*," and not copy the same from the copyrighted *work*. The record shows clearly that appellee sufficiently complied with the law of Congress, to entitle him to a copyright of the volumes from 32 to 46 inclusive?

Counsel, with apparent seriousness, contend and attempt to show that the burden of proof was upon appellee, as complainant, to show, not only his title to the copyright, but to prove that he had technically and literally complied with the law of Congress under which he acquired such title to his copyright, and that in this particular he had wholly failed. Volumes 33 to 46 were originally published under the act of Congress of 1831. To obtain a copyright under this act, the proprietor or author was required: *first*, to deposit a printed copy of the title of the book in the clerk's office of the district court of the district wherein the author or proprietor resided; *second*, to print notice of copyright on the title or succeeding page of each copy of every edition; *third*, within three months of publication thereof, to deliver a copy of the book to the clerk of such district court.

It is evident, from the reading of the sections containing these requisites, that the right of the author or proprietor to the copyright vests in such author or proprietor the moment the title of the book is deposited and filed with the clerk, otherwise an infringement might occur before publication and therefore before the author or proprietor could meet the last two requirements, namely, printing upon the first or succeeding page notice of his copyright, or depositing a copy of the book with the clerk, and in such case he would be without remedy.

The law of 1831 of Congress provides, Sec. 4:

Upon depositing "a printed copy of the title of such

book in the clerk's office of the district court," etc., "the clerk of such court * * * is directed and required to record the same forthwith in a book to be kept for that purpose, in the words following (giving a copy of the title, under the seal of the court, to the said author or proprietor, whenever he shall require the same): 'District of ...., to wit: Be it remembered that on the .... day of ...., A. D. ...., A. B., of the said district, hath deposited in this office the title of a book (map, chart or otherwise, as the case may be) the title of which is in the words following, to wit: (here insert title), the right whereof he claims as author (or proprietor, as the case may be), in conformity with an act of Congress entitled, 'An act to amend the several acts respecting copyrights.' C. D., clerk of the district.' "

The words beginning with "district of——," and ending with "clerk of the district," above quoted constitute the form with the blanks filled in, which the record of the deposit with the clerk of the title to the book shall be made. Before the words "district of ——," in the second section of this act appears in parenthesis the words:

"Giving a copy of the title, under the seal of the court, to the said author or proprietor, whenever he shall require the same."

The "copy of the title, under the seal of the court," required to be given by this section to the author or proprietor upon his request, certified to by the clerk, is made evidence by the act itself, of the claim of such author or proprietor, to a copyright applied for *and obtained* "in conformity with the act of Congress," and entitled "an act to amend the several acts respecting copyright."

There is no provision in this section or in any part of this act requiring a like record to be made and kept, showing the deposit of the book with the clerk, after publication.

A requirement, not made a condition precedent in express words, will not become such by implication.

Appellee offered, and the court below admitted in evidence, a certified copy of the record kept in the clerk's office, certified to by the clerk as required by the provisions of the law of Congress, as follows, viz:

"United States of America, Northern District of Illinois, ss., Clerk's office of the district court of the United States for said district.

"Be it remembered that on the 12th day of August, A. D. 1865, E. B. Myers and Chandler, of said district, deposited in this office the title of a book as follows, to wit:

"Reports of cases at law and in chancery argued and determined in the Supreme court of Illinois, by Norman L. Freeman, counsellor at law, volume 32, containing the remainder of the cases decided at the April term, and a part of the cases decided at the November term, 1863,—The right whereof they claim as proprietors, in conformity with an act of Congress, entitled, 'an act to amend the several acts respecting copyrights.'

"WM. H. BRADLEY,
"*Clerk.*"

This copy of the record is certified to by the clerk in the following words:

"NORTHERN DISTRICT OF ILLINOIS, ss.

"I, William H. Bradley, clerk of the District court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true copy from the records of said court in the matter of the entry of a copyright by E. B. Myers and Chandler, as the same appears of record in said court and now remaining in my custody.

"In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, this 12th day of August, A. D. 1865, and of our independence the nintieth year.

[L. S.] "WM. H. BRADLEY, *Clerk.*"

Under and upon which appears the following words:

"Work deposited Jan. 17, 1866. Wm. H. Bradley, Cl'k."

And in like manner a copy of the record, of depositing the titles of volumes 33 to 46, inclusive, were duly certified to by the clerk in the form and in the manner above shown, and in the express words, and as required in section 4 of the act of Congress of 1831, under which the copyrights to these volumes were secured. The deposit of the "works" were indorsed on these certified records.

It is further provided in section 4 of this law:

"And it shall be the duty of the clerk of each district court, at least once in every year, to transmit a certified list of all such records of copyright, including the titles so recorded and the dates of record, and also all the several copies of books or other works deposited in his office according to this act, to the secretary of state to be preserved in his office."

The author or proprietor is not required to apply to the secretary of the interior for any proof of his compliance with any provision of this law.

Counsel cite *Merrill* v. *Tice*, 104 U. S., 557, in support of his objection to this proof so made, of the deposit of the copy of each volume with the clerk. In the case cited, there appeared below the signature to the certificate of the librarian that a deposit of the title had been made, a minute of a deposit of two copies of the book without the signature of the librarian thereto. Of such a loose and apparently stray endorsement unsigned, this court said:

"Such extraneous matter may be added by other persons, or may be erased or altered without involving the offense of forgery or alteration of the certificate."

In the case at bar, the statement, "work deposited, Jany. 17, 1866," is signed by William H. Bradley, clerk, and so the same statement of the deposit of the book written upon each certificate, and the copy of the record of the deposit of the title of the book is signed by the same person as clerk. Thus as to signature both are equally admissible in evidence. His signature gives to the statement that the "work" was deposited on the day and year named, a distinctive official character. The signature of the clerk to the statement that the "work" was deposited on the day and year named, is as solemnly affixed and gives equal official force and certainty as the signaure of the clerk to the file mark of a declaration or bill in chancery which is never questioned in any judicial proceeding.

In *Dyer, etc.*, v. *Last*, 51 Ill., 181, held:

"It is first urged, as a ground for reversal, that the affidavit upon which publication was ordered was insufficient, as it does not appear that it was sworn to before a proper officer, or, in fact, any officer authorized to administer the oath. The signature of Harlow is not followed by the word 'clerk,' or any other means of designating the official capacity in which he acted by his deputy, nor does it appear of what office the latter was deputy, and hence it is claimed the affidavit is not sufficient to support the order. * * * The record, however, shows a person of the same name signed the notice for publication and the summons that was issued, as Circuit clerk. Hence, we may reasonably and fairly conclude that the court below knew and took judicial notice that Harlow was clerk of the court, and that the affidavit was signed and sworn to before him. All courts have the right, and it is their duty, to take notice of the persons who are their officers; and the court below might well find that Harlow, before whom the affidavit of non-residence was sworn to, was the clerk of the court, and, if so, then it was amply sufficient. * * * The summons and other

papers, and file marks, show that Harlow was clerk, and we must presume the court below took judicial notice of the fact."

In the case at bar, William H. Bradley, who signed the receipt acknowledging the deposit of the volumes, respectively, as clerk, was the clerk not only of the district in which the copies of the titles and copies of the volumes severally were required to be deposited, but he was the clerk of the court in which this suit was brought, heard and determined. *Thielmann* v. *Burg*, 73 Ill., 294.

I assume that all the court could require in this case is competent proof that the book was deposited as the law requires. Assuming that the burden in the first instance is upon appellee, it is clear that the receipt of the clerk plainly and simply acknowledging he had received for deposit in his office volumes, with date, would be sufficient? Is not the statement signed by the clerk equally admissible and competent? Here are the two parties named in the law, the author or proprietor directed to deposit, and the clerk directed to receive. It has been repeatedly held that the testimony of the author or proprietor that he mailed the required copies to the librarian at Washington for deposit, is competent and sufficient to establish at least *prima facie*, if not conclusively, his compliance with the law in this particular. If the verbal evidence of the sender is thus sufficient, is not the written official acknowledgment of the receiver and official custodian, equally certain, original and competent? The person mailing or delivering the copy to the clerk may die, but the entry of the deposit and receipt of the book in the clerk's office remain, and each succeeding clerk may furnish official and conclusive proof of the receipt and deposit of the book. This proof must be made

from the record, so far as the clerk is concerned, after the first year of its receipt, because within that time the law directs all copies of such books to be transmitted to the secretary of the interior. This case—a written endorsement of the actual deposit of the work, signed by the proper official character, under the law of 1831—was not before this court in *Merrill* v. *Tice*, *supra*.

Drone, at page 498, states the rule:

"But when it appears that the copyright has been secured in the manner prescribed by the statute, and that it is the property of the plaintiff, a *prima facie* case is made out, and the burden is on the defendant to show that the copyright is invalid, or the plaintiff's title defective."

In note I, the learned author cites and quotes in support of this rule from Equity Jurisprudence, section 936 note 6, in which Mr. Justice STORY, says:

"*Prima facie* the copyright confers title, and the *onus* is on the other side to show clearly that, notwithstanding the copyright, there is an intrinsic defect in the title."

Counsel quotes at length from *Wheaton* v. *Peters*, 8, Peters, 664, as to the necessity of performing the conditions precedent to entitle the author or proprietor to a perfect copyright; also cites and quotes

Murray v. *Bogue*, 1 Drew., 353.
Baker v. *Taylor*, 2 Blatchf., 82.
Chase v. *Sanborn*, 6 Pat. Of. Gaz., 932.

How do these authorities apply to the point in argument. The question is not whether appellee was required by the law to deposit a copy with the clerk, but has he sufficiently established by proof such deposit? It is not averred in the bill nor was it held by the court below, or found in the decree, that appellee claimed and was entitled to maintain his copyright to the volumes involved

in this controversy without depositing a copy thereof, with the clerk within the time and in the manner required by the act of 1831. On the contrary, such a deposit is expressly averred in the original and supplemental bill. *The simple question is*, whether the statement that copies of each of these volumes written upon the certificates of the clerk and signed by the clerk as heretofore shown, constitutes *prima facie* proof of such deposit.

But counsel must limit his argument in support of his objections to the admissibility of this evidence, as well as to all other certificates, to the specific objection made at the time these certificates and endorsement of the receipt of the deposited books thereon were offered in evidence before the master.

Counsel's specific objection is, to wit (Trans., 497):

"To the introduction of that portion of each of said papers (certificates), respectively pertaining to volumes 32 to 46, both inclusive, at the bottom thereof purporting to show the dates when each of said volumes was deposited, defendants then and there objected on the ground that the same constituted no part of the clerk's certificate, but was a mere anonymous statement, when and by whom made not appearing, and that the same as to each and all of said volumes was wholly incompetent to show the date of such deposits; which objection was overruled by the court; to which ruling of the court defendants then and there objected."

This is the only specific objection made by counsel to the certificates, and the endorsement thereon of the deposit of volumes 32 to 46, except the certificates to volumes 34 and 35.

This objection recites but one specific ground, namely, that the endorsement of the receipt of the books for deposit "constituted no part of the clerk's certificate," *because* it "was a mere anonymous statement," etc.

The "ground" of the objection is in the singular. Counsel so limited it, and the words, "was a mere anonymous statement," were intended to state the reason, to define the simple specific "ground"—why the endorsement "constituted no part of the clerk's certificate." The word "anonymous" is defined by Webster to mean "without name; wanting a name; nameless; as an anonymous pamphlet." The endorsement of the receipt of the books for deposit upon the certificates is regularly dated, and officially signed "Wm. H. Bradley, Clerk."

The cases above cited upon this point clearly hold, that a court will take judicial notice that the person signing as clerk is the clerk of such court, and is duly authorized to sign the document as such, even though his signature is not attended by the word "clerk." That no proof in addition to his signature is required to identify and establish his official character. In this case the same signature with the official designation of clerk appears under the endorsement and the date thereof that appears to the certificate of the record of this case in this court. Notwithstanding this fact, counsel made the specific objection that the endorsement "was a mere *anonymous* statement, "when and by whom made, not appearing."

The words following "statement" did not express a specific ground, but give the reason why the endorsement is an "anonymous statement." Counsel does not object to the certificate and the copy of the record showing the deposit and entry of record of a copy of the title of the book, although this certificate is signed by the same person with the same initials and with the word "clerk" affixed thereto.

If this court will take judicial notice that Wm. H. Bradley who certifies to the record in this case with the

word "clerk" affixed to his name, is the clerk of the court in which copies of the titles of these volumes were deposited as required by law and entered for record, and no objection is made to the manner in which such certificates were signed by Wm. H. Bradley as clerk, and such certificates, together with the endorsements purporting to be signed by the same person as clerk, are incorporated in this record, which record is certified to by the same person as clerk; will this court require further proof as to the identity of the person signing such endorsement—further evidence of his official character? In any view can it be said that these endorsements are "*anonymous*," that this signature of a person purporting to be, and filling the office of clerk, leaves them "*nameless?*" No other ground can be urged against the admissibility or competency of this evidence. By making the objection upon this specific ground counsel has waived all general or other specific ground of objection.

This precise question arose in *Evanston* v. *Gunn*, 99 U. S., 665. The admission of a certain certificate in evidence was objected to upon the specific ground that there was no law authorizing such records to be used "in evidence, and because it was not competent testi-"mony."

The court held: "The defendants having thus specified their objection, it must be considered that all others were waived, or that there was no ground upon which others could stand. *Berks & Dauphin Turnpike Co.* v. *Myers*, 6 Serg. & R. (Pa.), 12; *Chicago & Alton Railroad Co.* v. *Morgan*, 69 Ill., 492. We have then only to consider the objections that were made—the only ones that appear in the bill of exceptions,—and they present the question whether the record, conceding it to be properly proved, was competent evidence. * * * The inquiry to be made is, what is the character of the instrument? The record ad-

mitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. * * * They come, therefore, within the rule which admits in evidence, 'official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation.' Taylor, Evid., Sec. 1,429; 1 Greenl. Evid., Sec. 496. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl. Evid., Sec., 496. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him. *Galt* v. *Galloway*, 4 Pet., 332. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned: *DeArmond* v. *Nesmith*, 32 Mich., 231; *Gurney* v. *House*, 9 Gray (Mass.), 404; *The Catharine Maria* Law Rep., 1 Ad. & Ec., 53; *Clicquot's Champagne*, 3 Wall., 114."

The endorsement in question is brought directly within the salutary and necessary rule so clearly stated in this case. The law of Congress required appellee on account of his residence in order to perfect his copyright to deposit a copy of the book with the clerk and in the office of the clerk of this *district* court.

In such a case the court held, whether the statute required it or not, it became the duty of such clerk to keep a record of the deposits of these books, because he was made the legal custodian thereof, and it being his duty so to do, his certificate of the receipt would be clearly admissible.

In *Belk* v. *Meagher*, 104 U. S., 291, the court considers that the question was objected to on the ground that it was too general, but held:

"It is quite possible the witness knew facts that were material to the issue which was being tried. If he did, and the plaintiff desired to have them, the question should have been made more specific, and the objections to the form of that which was put, removed."

Counsel contends that appellants as to volumes 32, 34 and 35 offered to prove by certificate of the auditor of public accounts of the State of Illinois, and a certificate of the secretary of state showing sale by Mr. Freeman to the state of 553 copies of volume 32 and payment therefor, October 2, 1865, that it appeared upon certificates of the clerk that this volume was not deposited in the clerk's office until January 17, 1866, which was more than three months after the date of its publication; that appellants also offered similar certificates showing the purchase of 553 copies of volume 34 and payment therefor, October 23, 1866, which was refused.

Counsel contends this evidence was admissible, because the clerk's certificate offered by appellee purports to show the filing of the title of volume 34 in the clerk's office October 23, 1866, being the same day, as counsel insists, on which the 553 volumes were delivered to the secretary of state, as required by the statute; that therefore the title of volume 34 could not have been deposited with the clerk before the publication of the book, which it is insisted the law requires.

Counsel then quotes sections 22, 23, and 24, of chapter 29, of the Revised Statutes of 1845, to show that Mr. Freeman sold the copies so delivered to the secretary of state, under and by virtue of this act, which constituted the publication of the volumes. His honor, Judge Drummond, gave no force to these objections, and we respectfully submit his opinion overruling the same, in support of this argument.

Counsel cited these same sections of the statute in support of his first point, *namely*, that the state was the *employer* of Mr. Freeman, and therefore owned the work. In support of this point in argument, it is equally essential that counsel show under the *same provisions* of the *same law* that the state is a "public market", so that delivery to it of the 553 copies of volume 34, was a publication of the work within the meaning of the law.

Counsel has omitted to bring together and unite the relations of employer and purchaser in the same transaction for one consideration when the employer owns the material and pays for the labor as he asserts. To treat the state as holding these wide apart relations with Mr. Freeman in a single transaction under the same law by virtue of the single appointment, *does it follow* that the deliveries in question to the state was the placing of the books before the public for sale and purchase so as to constitute publication within the meaning of the law?

Will the court *presume* when the *work* appears to have been deposited on the same day delivery was made to the state, that the latter was made first, even if the delivery to the state should be construed a placing of the books upon the market open for purchase by the public, and therefore a publication within the meaning of the law. *That courts of equity do not indulge in presumptions favoring forfeiture of title is a familiar rule.*

Did the Callaghans understand upon the trial of this cause that a deliver of these copies by Mr. Freeman to the state, not for re-sale, not to be held for sale by the state, but for distribution as provided in the law constituted a publication—an offer of the work for sale to the public and in the public market?

Upon this point A. P. Callaghan testified, (Trans., 447):

"Q. What do you mean by published?

"A. Received from the printer *and put on sale in the store, bound.*"

B. Callaghan testified, (Trans., 497):

"Q. As I understand you, you say you printed it but did not publish it; please explain what you meant by that answer?

"A. *I mean that the publication may be printed and not published until it is marketed, or offered for sale*, when that is done I consider it published."

It will be observed that the statute cited by counsel required the reporter to deliver these reports to the secretary for the use of the state, and such delivery under a statutory requirement so defining the distribution of these volumes could not constitute a publication in any sense.

Drone, in defining publication in this sense, page 115, says:

"Properly speaking, a work is published when it is communicated to the general public. * * * In short to publish a thing is to make it public by any means or in any manner of which it is capable of being communicated to the public."

"But it is clear that a private circulation for a stricted purpose is not a publication." Drone, page 121.

In delivering these copies to the state, the author or proprietor was not dealing with the public, or any part of the public, so far as a market for the book was concerned. The delivery to the state was restricted under the statute limited to a special number, for a special purpose, and this compliance with this provision of the law did not extend to the public or market, or the trade; therefore, the copy of the warrant offered by appellants did not constitute

proof of publication in fact, or in view of the authorities cited, but to the extent that the delivery of these volumes to the state could be held a publication in any sense, would the failure to deposit a copy before such a delivery, on the same day or later, to the state, work a forfeiture?

The evidence shows that a copy of volume 32 was delivered to the clerk within a few days of three months after the date of the auditor's certificate. As above stated, there is no question that the deposit of the title page secures copyright. It was so expressly held by his honor, Judge Drummond, in *Bouccicault* v. *Wood* 2 Biss., 36, and in *Wheaton* v. *Peters*, 8 Peters, 662, held:

"It will be observed that a right accrues under the act of 1790, from the time a copy of the title of the book is deposited in the clerk's office."

Page 663. "A right undoubtedly accrues on the record being made with the clerk," etc.

This is equally true upon depositing with the clerk the title of the book, under the act of 1831.

Assuming therefore that the delivery of the copies to the state could be construed as a publication in any sense, will the court hold that it is sufficient to work a forfeiture of appellee's copyright to this volume?

In *Wheaton* v. *Peters*, the order remanding, directed an inquiry whether "said Wheaton or proprietor after the publishing thereof, did deliver or cause to be delivered to the secretary of state of the United States, a copy of the same, to be preserved in his office according to the provisions of the act."

The majority of the court deemed it "necessary to look into the evidence, and ascertain whether the complainants have not shown a substantial compliance with every legal requisite. But on reading the evidence we entertain doubts."

The dissenting judges deemed the order unnecessary and judicially declared, that the relief prayed should be granted on the evidence before them, but even the majority of the court did not rule or intimate in the controlling opinion that the deposit if not made within the time, (six months) the copyright was forfeited.

In *Dwight* v. *Appleton*, 1 N. Y., Legal Observer, 198, Justice Thompson held:

"The delivery to the secretary of state of the first volume of the work, within six months after its publication, and the rest of the volumes before the offense complained of was committed, or action brought, was a substantial compliance with the law. That this case was distinguishable from the case of *Wheaton* v. *Peters*. In that case it did not appear that the volumes had been delivered to the secretary of state at any time, and to ascertain this with other facts, a trial at law was ordered."

Thus it would seem clear that if it had appeared to the majority of the court in *Wheaton* v. *Peters*, that the requisite number of the work in controversy had been delivered to the secretary of state before the commencement of the suit, the order remanding for inquiry upon this point would not have been entered. The purpose of the law must be to keep in the public office by such deposit, a constructive notice of the completed "work" covered by the copyright, to which the public may have full and free access. If the deposit is made long before an infringement occurs, and the party charged with infringing was not misled by the delivery for deposit, then such omission is no excuse for the infringment. This is especially true, where the party charged had full, actual notice of the claims of the reporter and publisher.

As to volume 34 the certificate of the clerk is in evidence, stating that the title was deposited with him as required by the act of Congress.

It is further objected, however, that the certificate of deposit of the title is dated October 23, 1866, and by endorsement thereon, the work was deposited with the clerk on the same day. These dates being the same, counsel insist that the court will assume the book was deposited with the clerk before the title. The act of Congress provides, that a proprietor or author "shall, before publication, deposit a printed copy of the title of such book," etc.

The time that the deposit of the title shall precede the deposit of a copy of the work is not fixed by the act. Therefore, if the title was deposited one minute in point of time before the book was deposited with the clerk—if the delivery of a copy of the work to the clerk was immediately followed by the delivery of a copy of the work for deposit, the requirements of the law in this particular would be fully met; and the court will not presume that the law was disregarded in this particular, and that the copy of the work was actually delivered in point of time before the title of the work was delivered to and deposited with the clerk in order to adjudge a forfeiture of the copyright. Forfeitures in such cases are odious to courts in equity, and no presumptions are indulged in their favor. The certificate of the clerk in proof as to volume 35 states, that the printed title was deposited with the clerk, January 26, 1867. The printed notice of the title page original edition published, dates the entry of the copyright in the year 1866. Counsel contend that the variance in dates between the certificate of the clerk and the title page of the book is fatal to appellee's copyright, and in support of the position, cites *Baker* v. *Taylor*, 2 Blatchf., 22, which is the only authority he produces in support of his most technical po-

sition. In the case cited, the opinion was delivered by the Hon. Samuel R. Betts, district judge for the southern district of New York, while in the case at bar the variance was held immaterial by one of the most learned and distinguished judges of the Circuit court. This same objection was urged and the same authority cited upon the hearing of this cause before his Honor Judge Drummond, who recognized that the law under consideration should receive a construction which would tend to secure the author or proprietor in the enjoyment of his well earned literary property and rights, rather than by a most strained and strict construction of the law give greater license and protection to literary pirates. An equally technical objection is urged to volume 36. The clerk's certificate shows the printed title filed by E. B. Myers and Chandler. The printed notice of the title page shows entry was made by E. B. Myers alone. For this reason counsel contends that the copyright to this volume, otherwise regular, must fail, the author and proprietor must lose the fruits of their labor, and appellants be judicially justified in appropriating their property. As stated, the purpose of the law, requiring the entry of the copyright title upon the first or second page of each copy of the edition, is to give notice to the public, that an appropriation of the book bearing such notice will constitute piracy—an infringement of the copyright, and will be punished as such.

Would the name of Chandler add to the sufficiency of this notice or enlarge its warning? *Was it necessary to continue his name in the notice after sale of his interest to appellee?*

The courts will and ought to require a substantial compliance with the law of Congress, creating and controlling copyrights, but they will undoubtedly be as liberal in the

construction of this law as they are in the construction of the land laws under which title to real estate is derived from the government—as in the construction of the mineral laws under which title to precious metals of fabulous value are acquired by the most illiterate, at the rate of five dollars per acre. In the construction of these laws, only a substantial compliance with the provisions are required. Forfeitures are not favored—abandonments of claims and homesteads, are not presumed—the encroachments of "claim-jumpers" are not encouraged, but every facility is given to all honest, original claimants of homestead and mining claims to perfect their title, notwithstanding serious irregularities.

III.

HAS APPELLEE SHOWN TITLE—PROPRIETORSHIP—IN VOLUMES 32 TO 46 INCLUSIVE.

Counsel contends in argument, that appellee has wholly failed to maintain the title averred in his bill, as required to entitle him to the relief prayed and decreed.

In support of this position counsel says:

"No assignment, document, contract or memorandum of any nature whatever was offered by appellee to prove the title averred by his bill to have been derived from Freeman, the reporter, or from Chandler, his former partner, nor was any parol proof offered upon this point, even if such title could have been established by parol."

Was the averment of title by assignment in writing or otherwise, or proof thereof, essential to appellee's right to recover?

The bill avers that so far as the matter of these volumes

was prepared by Freeman, the same came to appellee in the form of manuscript; that volumes 32 to 38, inclusive, were purchased in manuscript form by the firm of E. B. Myers & Chandler; that thereafter appellee became the owner of Chandler's interest and purchased in his own name the manuscript, etc., from Freeman for volumes 39 to 46, inclusive. To the extent that Freeman prepared the matter, he was author, which he afterward sold to appellee, who became the proprietor, and, therefore, whatever appellee contributed by way of additional matter, or from arranging, dividing, paging, numbering, indexing, etc., the matter for publication into volumes, he was author as well as proprietor. While the work is in manuscript no form of assignment or contract of conveyance is essential. The sale of the manuscript is not an assignment of the copyright and the copyright cannot be transferred until after it has been secured.

Drone, speaking of assignee (page 238), says:

"But the meaning of assignee, as used in the act, is not restricted to an assignee of the privilege created by the statute. It embraces also a person to whom an author has transferred his unpublished work before statutory copyright right has attached to it. In other words, the statutory copyright right will vest *ab initio* in an assignee as well as in the author himself. Both the English and American statutes expressly recognize the right of the 'proprietor' of an unpublished work to enter the copyright in his own name, and the law has been repeatedly construed to this effect by the courts."

(Page 239): "But when he (the author) disposes of his property in an unpublished work, he does not assign the statutory copyright, because that does not then exist, and hence cannot be assigned. * * * What is passed is the common law property in the manuscript. * * * He (assignee) acquires the right not only to publish and to secure the statutory copyright, but also to

withhold from publication, or to publish without securing, the copyright; and thus, if he wishes, to abandon his property to the public. * * * Whether a person who has derived a title at common law is or is not an assignee, and whether such title is or is not valid, is to be determined by the common law, and not by the statute. Now, at common law, neither a written nor a formal assignment is necessary to make a person an assignee. The owner of an unpublished work may sell it, exchange it, or give it away."

Page 241: "Statutory copyright, etc., in the United States may be secured in the first instance not only by the author, but also by the owner of an unpublished work who has derived his title from the author; and it is immaterial in what way, provided it be lawful by the common law, the owner has acquired the property in such unpublished work."

Page 307: After considering the English rule, Drone says:

"What, then, is the mode of assignment after publication and after the statutory copyright has once vested in the author? If any formalities or requirements were prescribed by parliament, they would doubtless have to be observed. But as already said, the statute is silent on this point. Hence according to a well established rule of construction the mode of transfer can be governed only by the common law; and by the common law as has been said, a good assignment may be made by word of mouth."

Therefore, as to the transfer of the manuscript from Freeman to Myers and Chandler, no formal contract or written assignment was necessary, and the question of such transfer is not material in this case because it did not transfer the copyright.

Section 7 of the act of 1831, regulating assignments and requiring the same to be duly acknowledged and recorded is solely for the protection of the purchaser and mortgagee. It furnishes no defense to a defendant

charged with infringement, or right of inquiry to the literary pirate. Under these liberal rules controlling the disposition of manuscript or copyright by the author, the contention of counsel cannot prevail. And to these authorities may be added the fact that appellants, after the sale by Chandler of his interest to appellee, commencing in March, 1877, attempted by every means short of paying an adequate consideration, to secure a transfer, or to negotiate for the control and right to re-publish volumes 32 to 46 inclusive.

Bernard Callaghan, one of appellants, testified, transcript 187:

"Q. Do you not know that in the years 1876 and 1877, Mr. Myers' volumes from 32 to 46 were copyrighted?
"A. No, I do not know it positively.
"Q. You knew he claimed the copyright did you not?
"A. Yes, sir; I understood he did.

Transcript 195, same witness:

"Q. In your negotiations (with appellee) were not these volumes specified, that you were to have the copyright of 32 to 46? Is that not what you have sworn to in your affidavit filed in this cause?
"A. I think so; that is, we were to buy all his stereotype plates, and stocks, and his alleged copyright in these volumes.
"Q. Including the copyrights of 32 to 38?
"A. Yes, sir. Well, it was including the copyright of 32 to 46."

Thus appellants not only recognized appellee's title to the copyrights for 32 to 38 inclusive, but it is a fact that they negotiated with him for the purchase of these copyrights, admitted that they knew he was the owner thereof, and so treated the ownership in the attempted negotiation and purchase thereof from appellee.

In addition to this testimony, this express recognition of appellee's title to volumes 32 to 46 inclusive, appellee testified (Trans., 104):

"Q. State if in 1876 and 1877, you were the owner of any of the copyrights of any of the Illinois Reports, if so, what volumes?

"A. *I was the owner of volumes 32 to 46 inclusive.*"

"Q. State if Callaghan & Co., the defendants in this suit, had any knowledge of your claim to the copyright of the volumes in question in this suit from January to July, 1877? (Trans., 105.)

"A. THEY WERE AWARE THAT I OWNED THE COPYRIGHT—HAD A COPYRIGHT. * * * In the latter part of the year 1876, we (appellee and appellants) had several interviews regarding the sale by me and the purchase by them of my copyrights and stereotype plates of volumes 32 to 46 inclusive. * * * A proposition was made by Callaghan & Co. to me, first at $4,000, and subsequently at $3,000, which was declined, as I did not deem it a sufficient price for the property."

Mr. Freeman testified, transcript 314:

"It was understood that Mr. Myers was the owner of the copyright of from 32 to 46 inclusive."

Mr. Freeman issued his circular to the profession and trade dated February 26, 1877, in which he says, transcript 322:

"E. B. Myers, of Chicago, owns the copyright of the other volumes which are out of print, 32 to 38 inclusive, and there is a fair probability that he will reproduce them in a short time."

This evidence is not contradicted, and establishes ownership of the copyrights in appellee.

No objections were made to the admissibility of this evidence in the court below, upon either special or general grounds. If this evidence of ownership was unsatisfactory—not the best evidence, it was incumbent up-

on counsel to object upon the specific ground now urged for the first time, and then appellee would have had an opportunity to supply the proof now demanded in argument. Not having done so, it is too late to do so now.

In *Wilson* v. *King*, 83 Ill., 235, held:

"It is true that appellant interposed a general objection to their being read, but did not specify this or any other particular objection. This court has repeatedly and uniformly held that the objection here urged must be insisted upon in the court below; that fair practice requires that the objection must be pointed out, that the other party may have the opportunity to remove it; and if not specially made, the general objection will be regarded as only going to the materiality of the evidence under the issue. The adjudications of this court announcing this rule run through the entire series of our reports, and must be familiar to the entire profession, hence we deem it unnecessary to otherwise refer to or cite them."

The same rule is recognized and approved in *Belk* v. *Meagher*, *supra*.

Appellee testified without objection that he was the owner of the copyrights. This evidence was sufficient, unless disputed, to sustain the averment of ownership made in the bill. If counsel was not satisfied with this proof of ownership it was his duty to inquire of witness if the transfer had been made to him by Chandler in writing, and then require the production of such written transfer. Having failed to do so, counsel of appellee under the cases cited, has the right now to rely with entire confidence upon this undisputed evidence of ownership in appellee, and the objections of counsel for appellants comes too late.

IV.

HAS THE DEFENSE OF APPELLEE'S ACQUIESCENCE IN, OR CONSENT TO THE REPUBLICATION OF THE VOLUMES IN QUESTION BY APPELLANTS, BEEN ESTABLISHED BY THE PROOF?

These defenses are disproven by the undisputed evidence of the following facts:

First. No consent was given or requested, though appellants repeatedly attempted to purchase from appellee the copyrights in question.

Second. Appellee did not intend and never gave appellants to understand that he proposed to abandon his copyrights or to consent to surrender the same without consideration.

Third. Appellants did not reprint volumes 32 to 38, or 39 to 46, relying upon the silence, acquiescence or consent of appellee for justification.

Fourth. Appellants never acted upon any belief that appellee consented to their republication of volumes 32 to 38, or 39 to 46, inclusive.

Fifth. Appellants were expressly notified by appellee not to infringe his copyrights of these volumes.

Sixth. Appellants never stated to appellee that they intended to infringe his copyright by a republication of these volumes if he refused to sell, but they invariably guarded their threat of intended publication of these volumes *with the assurance* THAT THE SAME WOULD BE DONE BY THEM IN SUCH A MANNER AS TO AVOID AND NOT INFRINGE HIS COPYRIGHT, AND APPELLEE SO UNDERSTOOD IT.

These facts are clearly established by the testimony of appellants themselves.

A. P. Callaghan, one of appellants, testified:

"Q. I intended to have you understand it was from 32 to 38; did you ever ask Mr. Myers' consent to reprint those books?

"A. *No, we notified him that we would.*

"Q. You notified him of the intention, but you did not ask him for any consent on his part?

"A. I judged from all his conversations that I did not need his consent.

"Q. *I will ask you if you ever asked him for his consent that you should reprint 32 to 38?*

"A. No, *nothing more than what I have told you.*"

(Trans., 135): This witness testified that appellants, February 24, 1877, advertised in the Chicago Legal News their purpose to publish a "new edition of Illinois Reports."

Before appellants so advertised, they had seen Mr. Freeman's notice in the Legal News that Mr. Myers would reprint the volumes in controversy. (See testimony A. P. Callaghan, p. 147.)

Transcript 136, that this advertisement was printed in circular form and sent to every lawyer in the state.

"Q. Was the circular sent by you to the profession about this time announcing the republication of volumes 1 to 38, an exact duplicate of the advertisement as it appeared in the Legal News?

"A. It was in substance the same. After that time I had a further interview with Myers. This was after making this contract with Mr. Freeman which is in evidence here, I came back at Mr. Freeman's request to see Mr. Myers.

"Q. Now what took place between you and Mr. Myers, and when and where did this occur?

"A. It was in March, 1877."

"Q. What, if anything, was said about a purchase of his interest in these volumes at this time?

"A. *We desired to purchase the volumes 32 to 46 all the time.*

"Q. Did you make him any offer at this time in the month of February for his interest in those volumes?

"A. I do not think it was at the February interview we made that offer. I think it was at the next interview in March.

"Q. Go on with the March interview? * * *

"A. Well, I called on Mr. Myers at the request of Mr. Freeman to repeat to him my offer of $5,000. * * * I made a proposition to buy his interest in 32 to 46 inclusive for $5,000.

"Q. Did you state anything to him at that time, and if so what as to any arrangements your firm had then made concerning the republication of 32 to 38 inclusive?

"A. *I think that I informed him at all the interviews I had with him of our intention. It had been published. It was known to everybody.*" (Trans. 137).

"Q. Fix the month as near as you can?

"A. IN NOVEMBER, 1876, WE MADE UP OUR MINDS TO COMMENCE SOON, ALMOST IMMEDIATELY, THE REPRINTING OF THESE VOLUMES. WE HAD HAD THIS PROJECT IN MIND FOR QUITE A LONG TIME. *At that date we had determined to commence almost immediately the reprinting of them.*" (Trans. 133):

(Trans. 140): This witness refers to another conversation in June, 1877, with Mr. Myers, of which he testified upon the same point.

"A. We stated to Mr. Myers that before proceeding further with the expense of republishing the Illinois Reports, *we desired to buy his* COPYRIGHTS *and plates*—his interest in the whole of the Illinois Reports, that we would give him for his interest in the entire lot, $5,000.

"Q. What volumes were mentioned, if any?

"A. THIRTY-TWO TO FORTY-SIX, INCLUSIVE; that we would give him $5,000 for his interest in them, less the expense and costs already incurred in printing the volumes that were then either printed or printing.

"Q. By you?

"A. By us, of volumes 32 to 38. * * *

"Q. In what condition was the other volumes of your reports from 32 to 38 at the time of this June interview?

"A. Some in the hands of the printer being printed, and some in the hands of editors being edited for the press."

"Q. You have said you commenced the publication of volumes 19 to 38 in February?

"A. Yes, sir; that is, we commenced to make the arrangements for them." (Trans. 148).

"Q. Well, do you mean to say that you made your arrangements or your contract for the reediting list from 32 to 38 as early as you named in your deposition—February, 1877?

"A. About the same time.

"Q. Did you suppose and believe at that time that you had a right to reprint 32 to 38 without Mr. Myers' consent?

"A. Do you mean the naked reprint of his books—a literal reprint of his books?

"Q. Reprint them in any way?

"A. Why, certainly we would have a right to print them.

"Q. *Then you supposed that you had a right to reprint his books without his consent?*

"A. WE HAD A RIGHT TO REPRINT 32 TO 38 OF THE ILLINOIS REPORTS WITHOUT HIS CONSENT." (Trans. 149):

"A. I told him if he did not sell us the books at a reasonable price, or sell us his interest in the entire Illinois reports, then we would be compelled for our own protection to reprint them." (Trans. 150).

"Q. Why was there any difference made in the reprinting from 32 to 38 and the method of reprinting the volumes preceding 32? (Trans. 151).

"A. *We did not want to* INFRINGE—that was my impression—*we did not want to* INFRINGE *on Mr. Myers' rights.* * * * I considered, of course, that we had the right to do what we did.

"Q. That you were not infringing on any right of Mr. Myers?

"A. No.

"Q. *It was not necessary to have his consent to it at all?*
"A. NO, NOT FOR WHAT WE DID."

What testimony by which to maintain the defense of consent, acquiescence, and abandonment! Appellants made a contract to reprint volumes 32 to 38 in February, 1877, and in March and June following offered appellee $5,000 for his copyright in these identical volumes, and in each of these interviews declared to appellee that if he refused to sell, as they demanded, they would reprint appellee's entire set of the Illinois reports.

Is an offer of purchase of copyrights by infringers consistent with the defense of consent and abandonment?

But this witness expressly recognized in these interviews and negotiations that Myers owned the copyright to volumes 32 to 38. This witness testified upon this point that in republishing the volumes they did not wish to infringe the copyright of appellee.

If they relied upon Myers' consent, acquiesence and abandonment, why did they not make naked verbatim reprints of 32 to 38 inclusive? Why seek to avoid violating a copyright that had been surrendered, abandoned, and its use and appropriation acquiesced in by the owner?

These defenses are utterly destroyed and overwhelmed by the testimony of appellants themselves.

Bernard Callaghan, one of appellants, testified:

"Q. Now in all these negotiations between you and your firm, or Mr. Myers, did you ever ask Mr. Myers for his consent to your publication of 32 to 38, or 32 to 46, or either of them?

"A. I do not think I did. I have no recollection of asking him. I do recollect of asking him to reprint these volumes, and he said he would not." (Trans. 187.)

Was Myers compelled to reprint these volumes at the request of this witness in order to preserve his copyright? Does property in copyrights created by an act of Congress depend for security upon a compliance with the request of a stranger—a competitor?

Andrew Callaghan, one of appellants, testified:

"Q. Did you ever ask him (Myers) whether he objected to it (republication) or not?
"A. No, sir; I never did.
"Q. *Did you ever ask him to consent?*
"A. No, SIR."

It must be borne in mind at every point in the consideration of these defenses sought to be maintained against this overwhelming testimony, that during the time they alleged that Myers consented and acquiesced in their republication of volumes 32 to 38, and abandoned his copyrights thereto, they were negotiating with him for the purchase thereof, and had long before, years before, as testified to by A. P. Callaghan, made up their minds—deliberately determined—to republish these volumes before they had spoken to or attempted to negotiate with Myers concerning the same, or attempted to purchase them from him. Even more; they made the contracts for the reprint of these volumes early in February, 1877, before they opened negotiations for their purchase from Myers in March following.

Abandonment cannot exist without an intention on the part of the owner of the property to abandon it. To convict Myers of abandonment it must be shown that he not only intended not to publish, but that he intended to abandon to either appellants in particular, or to the public in general his copyrights. The oft repeated purpose of Myers to republish, and the actual republication

of these volumes, disprove abandonment beyond dispute. In 1876, prior to all negotiations, Myers had republished his volume 46, and in April, 1877, had made contracts for the republication of volumes 32 to 38.

A. P. Callaghan testified that he heard on his return from a trip to the east, that a firm of printers in this city were at work on Illinois reports for Myers either volume 37 or 38—understood they were printed for Myers. (Trans. 144.)

Mr. Luce of Marder, Luce & Company, type founders, testified, (Trans. 355):

"Q. State whether Mr. Myers prior to that time (May 18, 1877) if so, how long, had spoken to you about doing any of the other volumes, and what volumes?

"A. I don't remember how long before that, but he did talk to me about getting up a lot of those volumes for him, that he said were his, to fill in a gap between his and somebody else's.

"Q. Do you remember whether it was 32 to 38?

"A. I think that was it. I don't remember the numbers.

"Q. When was this conversation between you and him? About when? Before or after this work was done you have mentioned?

"A. It was before this work was finished about three months."

Mr. Reed of Hazlitt & Reed, testified, (Trans. 331):

"Q. State when you began that work (composition of volume 38) for Myers?

"A. Well, I have no means of ascertaining the exact date, but as near as I can get at it, it was about April 20th. The understanding was, that there was about seven volumes all told, as near as I can recollect. We commenced on the last volume first. There were about seven volumes."

PUBLIC ANNOUNCEMENTS BY ADVERTISEMENTS, CIRCULARS, ETC., CONCLUSIVELY PROVE MYERS HAD NOT DONATED HIS COPYRIGHTS TO APPPELLANTS AFTER REFUSING THEIR OFFER OF $5.000 THEREFOR, OR THAT HE HAD GRATUITOUSLY ABANDONED THE SAME TO APPELLANTS PENDING SUCH OFFER.

(Trans., 316): N. L. Freeman: "Reporter of books in controversy. In the fall of 1876, was the owner of volumes 47 to the latest then issued. Myers owned the copyright of 32 to 46, about half of which number he held in plates —the latter half. The purpose of the visit of Mr. Thomas and myself to Chicago was to secure Mr. Myers' co-operation in respect to his own volumes in connection with my own. An important part of the co-operation of Mr. Myers was in furnishing stock from the plates which he then had, and in producing those volumes which were then out of print. Myers agreed thus to co-operate so far as to authorize the St. Louis house to announce that the volumes from 32 to 46, then out of print, would be reproduced within a reasonable time. Within a few months after that time had several talks with Myers on the subject of his selling me his interest in the Illinois reports. His price was $8,000. This was after I made a contract with Callaghan & Co., in the month of March, 1877. At that time I had in contemplation, in connection with Wm. L. Gross, the re-reporting and re-publication of volumes 19 to 31 inclusive. We had several of them in press, and in various stages of progress. Issued circulars to the profession (see exhibit, page 322), in which we stated that '*Mr. E. B. Myers, of Chicago, owns the copyright of the other volumes, which are out of print, 32 to 38 inclusive*, and there is a fair probability that he will reproduce them in a short time.' Subsequent to the interview, in the fall of 1876, Myers *wrote* (see exhibit, page 323) that it was his intention within a reasonably short time to reproduce those volumes, in order to furnish full sets of the Illinois Reports at reasonable rates. Had a verbal agreement with Myers that he should

not sell his interest in the Illinois Reports to any person without my consent. When Myers first wrote me the Callaghan's were proposing to buy, I explicitly forbid him to sell them. (Page 319.)

(Trans., 333): Beckwith, corresponding clerk for Myers, states that he enclosed circular announcement of 32 to 46 in the letters he wrote to customers inquiring for these reports — used them when a customer inquired for these reports, and would address the postal card circular to them.

(Trans., 339): "Q. Look at the postal card and circular printed on the back of it, and state whether you ever saw it before, and where?

"A. Yes, in Myers' store. It was used for general distribution in 1877."

(Trans., 339): Mr. Willis V. Myers testified that the circular, "Exhibit A," to deposition of Hazlitt, was mailed by him to the book trade throughout the country.

(Trans., 340): George L. Myers testifies he saw the circulars when they came in from the printing office, and mailed them in the spring of 1877.

(Trans., 344): "Q. Look at the postal card which has just been examined by Mr. Beckwith, and state whether you know when that was printed, and if it was distributed?

"A. It was printed in the spring of 1877, about the time the laws were published, prior to the publication. Should say that about 3,500 were distributed over the state and to all the lawyers on the list of the city. Personally I addressed about 2,500, I think. It was from about the middle of May to the first of June, 1877."

(Trans., 353): "In answering letters to attorneys in the country would tell what volumes of reports we could furnish, and to some inquiries would say that Callaghan & Co. were reprinting 19 to 31, and that we were reprinting 32 to 38, in order to complete the set."

(Trans., 354): "Q. On the postal card that you have been examining the price of the ten volumes is struck out in ink. State whether that was done before or after the distribution of the cards that you have testified to?

"A. The postal card, as originally mailed, was as it

came from the press. The ink erasion there was made by myself. It must have been along in the winter some time. I struck out a few and handed them to Beckwith, and asked him to strike the price out of any he sent out after that. That was about the beginning of 1877, along in the winter some time."

E. B. Myers testified, Trans. 106: "That he announced the republication of these volumes by him in the month of March, 1877, by circular advertisements.

"Q. When you say these circulars were mailed, to whom were they mailed?

"A. That circular was mailed to the book trade generally; the others were to the profession, issued about the same time."

See Freeman's deposition, pages 317 and 319, and exhibit on page 124.

N. W. Baldwin, appellant's traveling agent, testified, Trans. 312:

"Q. Look at postal card 'Exhibit B' to the deposition of W. L. Mead and state whether you ever saw a copy of that?

"A. I believe I have seen that circular, but I do not know at what date. I have seen it somewhere.

"Q. Do you mean you saw it somewhere in your travels?

"A. Well I do not know where I have seen it; I have seen the circular somewhere."

This postal card circular, Exhibit B, reads:

"THE REPRINTED ILLINOIS REPORTS.

I have now ready for delivery Vols. 37 to 46, inclusive, Illinois Reports. Price for the ten volumes together, $40 net. Single volumes, $5 net. Vols. 32 to 36 to speedily follow.

I am the exclusive owner of the copyrights of Vols. 32 to 46, inclusive. They are reprinted from the original text. Volumes 47 to 80, inclusive, supplied at $3.50 per volume.

E. B. MYERS, Publisher,
93 Washington St., Chicago."

RECENTLY PUBLISHED.
The Laws of Illinois, 1877. Uniform paging with the state edition. Bound in law sheep. Price $2.00.

APPELLANTS OFFERED IN EVIDENCE.

Trans., 589. An advertisement of the complainant Myers, in an issue of the Legal News, dated September 8, 1877, as follows:

"The Illinois Reports reprinted from the originals now ready for delivery, volumes 37 to 46, inclusive, Illinois Reports.

"Price of the 10 volumes together, $40 net. Single volumes, $5 net. Volumes 32 to 46 to speedily follow. I am the exclusive owner of the 32 to 46, inclusive. They are reprinted from the originals, word for word.

"E. B. MYERS."

Callaghans were not only warned by Myers not to infringe, which was a defiant assertion of property in the copyrights, and an express purpose to retain and defend them, BUT THEY WERE FULLY ADVISED BY ADVERTISEMENTS IN THE LEGAL NEWS THAT MYERS PROPOSED TO REPUBLISH THESE VOLUMES *instead of abandoning their publication to the Callaghans.*

A. P. Callaghan (one of the appellants) testified, Trans. 147:

"Q. When you published the advertisement in the Legal News which has been attached to your deposition,

had you seen the advertisement of Freeman's announcement of his intention to publish any of the Illinois Reports?

"A. We had.

"Q. Was that anterior or subsequent to your announcement?

"A. *It was anterior to ours.*"

Freeman's announcement embraced also the announcement of Myers that he would reprint the volumes out of print.

This witness further testified, page 147:

"*It was in consequence*, or somewhat in consequence of his (Freeman) announcement at that time that we made the counter-announcement of about 19 to 38 at that time—but we had before resolved to print them, and we determined to print them long before we saw his announcement.

"Q. *When did you commence the publication of the volumes which Mr. Freeman had announced in his notice?*

"A. *Immediately* AFTER *the date of our announcement; February 24th, I think it was.*"

This is the evidence of appellants. It conclusively shows, first: *Callaghans were advised by Freeman's public announcement that Myers proposed to republish these volumes;* second, AFTER BEING SO ADVISED *by seeing the advertisements in the Legal News they published their "counter-announcement"—intention to print these volumes;* third, *that this "counter-announcement" was published by Callaghans* BEFORE THEY COMMENCED TO REPRINT THESE BOOKS.

The first work done towards republication was by Mr. Ewell March 31, 1877, over a month after this witness, one of appellant's, testified they had notice of the announcement by Freeman of Myers' purpose to re-edit volumes 32 to 38, inclusive, as well as from 39 to 46, in-

clusive. *The contracts for printing were not made until long after this first work beginning March 31st, was done,* and yet, counsel asserts in argument against this undisputed evidence—against this admitted notice to the Callaghans that they were misled by Myers, relied upon Myers' silence, assumed his consent, and that he had abandoned property *which he refused to sell to them.* All the negotiations conducted by Callaghans with Myers for the purchase of these copyrights were after they had seen Freeman's advertisement, and after they had advertised that they proposed to republish these volumes.

Myers' conduct, his reprinting the volumes, utterly destroy the defense of abandonment. An intention to abandon and the act of reprinting cannot coëxist. Correspondence of Myers with Freeman, the objection of Freeman to Myers selling to appellants, the public announcement made by Freeman in February that Myers owned the copyright to volumes 32 to 38, inclusive, and intended shortly to reproduce the same, are entirely sustained, and disprove any intention on the part of Myers to abandon his property and surrender his copyrights of these volumes to appellants. The evidence of appellants upon this point even fails to show that they were misled by the conduct of Myers in the slightest degree—that they were induced by any silence on his part to rely upon his abandonment of his copyright. They could not believe or suppose that Myers intended to abandon, consent to or acquiesce in the reprint of his volumes by appellants while they were conducting negotiations for the purchase of his copyrights.

Defendants proposed to reprint without Myers' consent if he refused to sell. They began the negotiation to purchase in the fall of 1876.

A. P. Callaghan testified of an interview in November, 1876. Trans., 133:

"A. I then asked him (Myers) if he would sell his interest in volumes 32 to 46 inclusive to us. He said he didn't know. It was to include the copyrights of volumes 32 to 46, inclusive, and the stereotype plates and the stock of 39 to 46, inclusive."

And appellants continued to negotiate with appellee for the purchase of this property until June, 1877. Of June (1877) interview witness testifies, Trans., 140:

"Q. *What volumes were mentioned, if any?*
"A. THIRTY-TWO to 46, INCLUSIVE. We would give him $5,000 for his interest, in them, less the expense and the cost already incurred in printing the volumes that were then either printed or printing."

Of this same June interview Bernard Callaghan testified, transcript 195:

"Q. *Including the copyrights of 32 to 38?*
"A. YES, SIR. *Well, it was including the* COPYRIGHTS OF *32* TO *46*."

The offer of Myers to sell—taking the offers made by appellant to purchase under consideration—was an open assertion of property in these copyrights, and constituted in itself a refusal to consent or to abandon.

A. P. Callaghan further testifies, transcript 145:

"I think I informed him (Myers) at all the interviews I had with him of our intention. It had been published. It was known by everybody. The question at issue between Myers and ourselves was whether we should reprint volume 39 to 46 or not. *Whether we should buy his entire interest in the Illinois Reports*, OR IGNORING HIS INTEREST IN THE ILLINOIS REPORTS REPRINT *39* TO *46*, AND SO AFFECT OR DESTROY THE VALUE OF HIS STEREOTYPE PLATES IN *39* TO *46*."

Not depending for the right to republish them upon the conduct of Myers, but to simply "*ignore*" Myers in the premises and to republish at all hazards. This witness further testified, transcript 145:

"Q. Didn't you, in a conversation that you had with Mr. Myers, say to him that you had the right to reprint these and that there was a way you could do it?

"A. *I did.*

"Q. And that you would do it?

"A. You mean all his volumes?

"Q. From 32 to 46.

"A. *From 32 to 38, and I am not sure but I included 32 to 46.*

"Q. *Did you not tell him you would have them reprinted?*

"A. I DID."

Observe that this witness defines and fixes a sharp and clearly stated alternative issue between appellants and appellee. That is, whether appellants would buy or "*ignore*" appellee's rights. They assert that this distinctive issue was settled between them and Myers by his acquiescing and consenting to their so "*ignoring*" his right.

As early as February 16, 1877, appellants wrote appellee, to wit:

"DEAR SIR: We are in receipt, by our messenger, of your decision upon our offer of $5,000 made to you on Monday last, to the effect that you refuse such offer and prefer to keep the property. We therefore withdraw the offer and beg to inform you that we shall not hereafter entertain any proposition of any nature looking to a purchase of those books. *You already are in possession of our intentions with respect to the Illinois Reports, and we write this for the purpose of putting on record the fact that the responsibility for whatever may occur in the future must rest with you through your refusal to sell.*

"Very truly yours,

"CALLAGHAN & COMPANY."

Thus appellants notified appellee that he had sinned away his day of grace; that they withdrew all offers for the purchase of his copyright and property, that he must take the responsibility of the result of his refusal to sell to them, and what has that "responsibility," so assumed by appellee, produced? The defences here made, namely, consent, acquiescence, abandonment and laches.

But appellee on the same day replied: "Gents: I am in the receipt of your note. Any one would judge from its import that I had commited an error or a great wrong simply in declining to sell my own property for less than its value. The amount you offer at eight per cent. will be much less than the property earns me, which, to a prudent man, is a sufficient reason for refusing to sell.

"Respectfully, E. B. MYERS."

Does a letter written and signed by the owner of a piece of property refusing to sell, asserting his intention to retain, signify an intention to abandon and surrender it? Yet immediately without any further negotiations appellants proceed to the publication of appellee's books.

Mr. Ewell, one of defendants, testified, transcript 218:

"Q. Have you made any examination of your books for the purpose of fixing the date of your contract with Callaghan & Company for re-editing volumes 32 to 36?

"A. I have. I find that I have made a minute of it in my diary, and from consulting it, my memory is refreshed so that I am able to testify that I made the contract on the 16th of February, 1877, for re-editing volumes 31 to 36. 31 was not printed. The volumes were expressed to me on the 20th of February, and I commenced working on the 26th."

Appellants also produced the contract between them and the Legal News Company, which provides for the printing of these volumes, and that contract is dated February 17, 1877.

A. P. Callaghan testified, transcript 163:

"The first letter that we have written to any house looking to the printing of these volumes, 1 and 19 to 38, was written to Charles VanBenthuysen & Sons, Albany, dated February 12th, asking their price. Letter dated February 19th to Atwood & Culver of Madison, Wisconsin, resulted in one of their men coming down here and he made a contract for four volumes. We made a verbal contract with Marder, Luse & Company about the same time, for two or three other volumes."

Appellants prepared the advertisement which appeared in the Legal News February 24, 1877.

Appellants withdrew all offers to purchase, February 16th, and on the same day entered into a contract for the republication of Myers' books, and continued during that same month to make contracts with editors, printers, etc.

They were executing their threats — proposing to to coërce or to "*ignore*" and crush appellee. They believed they were strong and that he was weak. They made their offer, he refused it. The title to property would be rendered most uncertain, if the wrongful taker was permitted to defend behind his understanding that the owner from whom he took it consented. But the testimony of appellants conclusively proves that such was not even their understanding—that they did not believe or rely upon the consent or abandonment of Myers. They literally reprinted from 19 to 31, inclusive. They reprinted volume 32 (Myers' first), with assumed changes. If Myers consented to their reprinting volume 32, or if they believed he had abandoned it, or acquiesced in their reprinting it, why not make such reprint openly literal as they had the other volumes to which Myers made no claim.

A. P. Callaghan testified upon this point, (trans., 151):

"Q. Why was there any difference made in reprinting from 32 to 38 and the method of reprinting the volumes preceding 32?

"A. We did not want to infringe, that was my impression—we didn't want to infringe on Mr. Myers' rights."

Their counsel asserts now in argument, that they reprinted because Myers abandoned his *rights*.

Mr. Ewell, one of the defendants, disclaiming, in the court below, testified, (trans., 212):

"Q. What was the object in making that change in the syllabus of the case, (in one of Myers' books)?

"A. *The obvious reason was to avoid infringing the copyright, not to copy it.*

"Q. I understood you to say that you intended to avoid using his (Freeman's) syllabus *for the purpose of avoiding a copyright?*

"A. Yes, sir."

Mr. Denslow testified of the syllabus, (trans., 221):

"I read them principally with a view of avoiding any correspondence in the mode of annotating the case."

He further testified in regard to instructions he received from Callaghan as to what he could use from Myers' books, (trans., 231):

"A. He (Callaghan) wanted so much of the book as was public property adopted; so much as was private, supplied from the opinion and from other portions of the book—in that manner he proposed to get out the book. * * * He designated what, for the purpose of this piece of work, he wished to be regarded as public property—what he considered we were entitled to take.

"Q. *Why did you endeavor to avoid taking it?*

"A. *So as to avoid, if practicable, the necessity of raising the question whether a state reporter could have a copyright on his work, which would be raised if his matter were used.*"

They were not relying, says this witness, upon consent or abandonment, but upon avoidance and defeat of the right of the reporter as author, or his purchaser as proprietor to a copyright upon these law reports.

Bernard Callaghan testified of June, (1877,) interview with Myers, (trans., 175):

"He (Myers) offered his entire interest including what he assumed to be his interest in 32 to 38, and also the place, stock, etc., of 39 to 46 and copyrights, for $7,000. We declined it. We offered to give him $5,000 for all his interest, less the amount we had already paid out in reproducing and re-editing 32 to 38, inclusive. I also stated to him that if we were to conclude an arrangement then, that perhaps we could arrange with some of our editors that we had contracts made with, to let up on those contracts and save expense so that we could give him nearer the $5,000 than we could if they were to go on and exact all that we had contracted to give them."

This offer was made long after they had commenced the work of republication.

How conclusive that appellants were not relying upon the silence, acquiescence or abandonment of appellee, but were attempting to purchase his consent for the sum of $5,000 less the deductions proposed.

Myers testified (before defendants were examined and they have not contradicted or questioned it in their evidence, trans., 106):

"They have and had before the filing of this bill announced by their advertisements the republication to the 46th, inclusive. They have reprinted 32, 33, 34, 35, 36, 37, 38, 39 and 43. That is so far as I know."

The Callaghan's claimed to Myers that they had the right to re-print these books,—there was a way of doing it so as to avoid his copyright without infringement.

Callaghan testified he told Myers, (trans., 137): "if we could buy his books at a reasonable price, that we would do so, but that if charged an unreasonable price for them we could not permit him to control the price of the set by charging a large sum for his volumes."

They insisted upon being the sole judge of the price Myers should receive for his property. He refused to take it. They withdrew their offer; declared all negotiations forever at an end, and from that date, February 16, 1877, proceeded to carry into effect the purpose of many years standing to re-print these books wholly "*ignoring*" Myers. A more bold, unjustifiable, high-handed piracy cannot be found in the reports, English or American.

On cross-examination, Myers testified, (trans., 113):

"Q. State all that was said upon both sides at that interview, as near as you can recollect?

"A. They were very anxious to buy my copyrights of 32 to 46 inclusive, including the stereotyped plates, and stock on hand, bound and unbound; and during the conversation, offered me $4,000 or $5,000. The subject of re-reporting *and publishing as they proposed to do it in order to avoid my copyright was discussed.* THEY CLAIMED THEY HAD A WAY OF DOING IT BY WHICH THEY COULD AVOID MY COPYRIGHTS, and stated that it could be done for about $150 per volume. The amount of composition and the expense of stereotyping each volume was calculated upon in their way, and the manner in which they could do it, and they endeavored to convince me that they could reproduce the volumes at about an expense of $700 exclusive of paper, press-work and binding. I endeavored to show them that it would be cheaper to purchase my interest in the volumes owned by me and produce an exact reprint, which would be more satisfactory to the bench and the bar. After considerable negotiations I withdrew without accepting their proposition. I do remember that I proposed to pool my volumes, which they had reprinted, at the same price.

"Q. Don't you remember of replying to Mr. Bernard Callaghan that you meant by their volumes, their reprints including all they were reprinting?

"A. No, sir; I will answer as I did before, that all conversations related exclusively and was meant to apply to the volumes which they owned; that is what I said. I have stated before, that all propositions which I made for an exchange applied to the volumes which they owned and the copyright of which they claimed they had purchased.

"Q. Did you not, at this interview at that store, in the month of June, say to them that you would sell to them your entire interest in the copyrights of 32 to 46 inclusive, and the stereotyped plates, stock on hand, and the volumes in the store, for $7,000?

"A. I did tell them I would sell them for $7,000 rather than be continually quarreling over the Illinois Reports. Their reply to that, and also the proposition which I made to pool, was this, that they did not desire to pool; that it was their intention to purchase and control the entire set of Illinois Reports, and that if I did not accept their proposition they would proceed to republish the volumes owned by me; that there was a way of doing it by which they could avoid my copyright. *I stated repeatedly, at that interview, that they could not reprint my volumes without infringing;* THEY TOLD ME THAT THEY HAD A WAY AND COULD DO IT; could hire a man to do it for about $150 per volume; that they had a man engaged on that book; they used nearly every threat that they could to bring about to coërce me into selling property which I considered worth from $10,000 to $15,000 for about one-third of its value.

"Q. Did Mr. Bernard Callaghan at that interview say to you that they were then reprinting volumes 32 to 38 inclusive?

"A. I think they had issued, or were about to issue one volume. I am not certain—at least they said they were.

"Q. What did Mr. Bernard Callaghan say to you at that time with reference to their reprinting volumes 32 to 38?

"A. *He said if I did not sell, they would reprint them.*"

This evidence, especially that Myers said to them that *they could not reprint* WITHOUT INFRINGEMENT, AND THAT THEY INSISTED THEY COULD *was not disputed*, and yet, counsel in the review of the testimony quoted by him in the argument of this point, says:

"We beg the court to observe that not only did Myers by his silence encourage Callaghan & Co. to proceed with their publication and consequent large expenditure, but that he actively and openly encouraged such publication * * * by furnishing them his volumes 39 to 46 at the same price at which they were supplying him their reprints, including 32 to 38."

What an absurdity!

Myers actively and openly encouraged the infringement of his own copyright? Proposed to exchange a part of his property, to wit: volumes 39 to 46, inclusive, for other property equally his, namely, volumes 32 to 38, inclusive? Encouraged the republication of these volumes by refusing to take one-third of the value for his property offered to him by appellants? Is argument needed to answer such an inconsistent improbability?

Upon the question of silence and acquiescence, counsel says:

"Not a syllable of complaint as to the infringement but only a pitiful whine that he is charged too much for what he now contends to have been stolen property."

Counsel's clients, under oath, admit that they stole by this act of piracy from Myers the sum of $5,000 according to their own judgment and estimated value of the copyright of volumes 32 to 46, inclusive, and the books, etc. Myers' contention for his rights in the premises, rights that were found and maintained by both the circuit and district judges in the court below, is called by counsel

"a pitiful whine." But counsel asserts and re-asserts that the so-called arrangement for exchange included 32 to 38 as the rightful property of the Callaghans as against 39 to 46, admitted to belong to Myers, while at that identical time and in the face of this agreement, even conceding it to be as maintained by counsel, which the evidence clearly disproved, appellants were engaged in re-printing volumes 39 to 46, as afterwards averred in the supplemental bill, proven on the hearing, found and decreed by the court. The evidence as clearly shows that Myers abandoned to the Callaghans and consented that they might reprint volumes 39 to 46, inclusive, *as* that he abandoned and consented that they might reprint volumes 32 to 38, inclusive.

At the very time this arrangement for exchange was being negotiated, the Callaghans were attempting to purchase the copyright of Myers to volumes 32 to 38, and yet counsel argues that they then were the property of the Callaghans. What, appellants purchase their own property from Myers? Yet, such would be the case if it were true that they acquired the right to reprint volumes 32 to 38 by the consent, abandonment or acquiescence of Myers.

This agreement for exchange, if made, was in March, 1877, and was terminated in April. Callaghans bought some of Myers' books, but even during the short life of this agreement they certainly had none of the reprints of Myers' volumes to sell, and none were issued for several months after that. The agreement was to cover books in existence, not unpublished works. It was made in March and terminated in April, 1877.

Myers testified that the agreement only contemplated books the Callaghans then had, and they were arranging only for what he then had. Callaghans then had reprints

of prior volumes 1 to 30. Myers bought several hundred of them during 1876–7.

A. P. Callaghan, upon this point, testified in regard to the negotiations for exchange:

"Myers offered to exchange; I will not state positively that he said 1 to 38, but he said our books."

Callaghans did not own and had not then reprinted 32 to 38, inclusive, and therefore had no such books.

Mr. Beck testified they were called "our reprints," but Callaghan & Co. at that time had notice that Myers was reprinting volumes 32 to 38, inclusive. Why should Myers, or why should Callaghan suppose Myers was including in this negotiation for exchange the unprinted pirated reprints of the Callaghans, when at the same time they were being reprinted by Myers under his copyrights, and which Myers had before, at that time and continuously thereafter refused to sell to Callaghan & Co. at the price offered?

The so-called contract for exchange was made in March, 1877, *and during the months previous appellants had seen Freeman's advertisements that Myers would republish the very volumes* WHICH THEY NOW CONTEND MYERS AGREED IN THE MONTH OF MARCH TO TAKE FROM THEIR REPRINTS BY WAY OF EXCHANGE.

E. B. Myers (page 362), and George L. Myers (page 343), both testified that this contract only contemplated appellee taking from appellants, by way of exchange, copies 1 to 31, inclusive, and this testimony, to my mind, is conclusively corroborated by the announcement in Freeman's advertisements, in February, that appellee would republish volumes 32 to 38, inclusive, and that Myers did do the very thing advertised, and Callaghans

knew of these advertisements, as testified by A. P. Callaghan (page 147), the month before the so-called contract was ever even comtemplated.

THE EVIDENCE AGAINST ABANDONMENT, ETC., FURTHER CONSIDERED.

Reed, of Hazlitt & Reed, printers, testified (page 331), that they began work on volume 38 for Myers, April 20, 1877.

Luse testified (Trans., 355), that "they were stereotyping the 38th volume for Myers, in May, 1877; they were at the same time working on volume 30 for Callaghan & Co. They (members of the firm of Callaghan & Co.) were in and out of our establishment frequently, and one of the firm of Callaghan & Co. was in the stereotyping foundry with me at one time when Mr. Myers was with me; we went up there together; one of the Callaghan's was there; I don't know which one it was.

"Q. State whether they knew you were then stereotyping this volume for Mr. Myers?

"A. I could not state that positively, but I don't see how they could help knowing it; Mr. Myers talked about it with me at that time.

"Q. At the time that you were there with Mr. Callaghan and him?

"A. Yes, sir."

Then Myers was not attempting to conceal from Callaghans his republication of these volumes? He talked of it openly to this witness in the presence of one of the Callaghans. Up to this time Callaghan & Co. had only contracted to pay Ewell and Denslow $100 per volume for the re-editing work.

Mr. Ewell testified (Trans., 218):

"I finished volume 32, May 2, 1877; I finished 33, May 26th; I took 35 next, commencing it May 28, finished

it except index, June 26th; commenced the 34th, June 28, and finished it July 23rd; commenced the 36th, the 26th which was finished without index Sept. 28th. Myers had volumes 37 and 38 printed at the Legal News Company, where Callaghan & Co. were having like work done and members of their firm were frequently there."

A. P. Callaghan testified (Trans., 159), that he went east about the last of June and spent the 4th of July in Boston.

Note the statement of this witness that upon his return in August :

"I heard for the first time that the Legal News Company was printing a volume for Myers, which was identical with ours."

Myers' volume was a reprint of the original, and how could it be identical with Callaghan's, unless Callaghan's was likewise a literal reprint of Myers' original corresponding volume.

George L. Meyers, testified (Trans., 341):

"Q. In the course of those interviews was anything said by A. P. Callaghan or Bernard Callaghan, as to what they would do in case your father would not sell to them his interest in the books, if so, what did they say they would do?

"A. They said if he refused to sell, to comply with their demands, they would proceed to get out volumes for themselves. *He (father) said he did not believe they could publish volumes on which he held the copyright.* Andrew P. Callaghan was the chief trader at this time; he stated he knew a way. This conversation took place in February, probably the early part of it; *he, Andrew P. Callaghan said he knew a way by which the copyright could be avoided;* he mentioned no particular way of doing it; *he merely said he knew a way by which it could be done,* WITHOUT INFRINGING ON THE COPYRIGHT.

All the witnesses on both sides testifying upon this point agree that the Callaghans repeatedly asserted that if Myers refused to sell they would republish volumes 32 to 38, and to 46 inclusive, and that they would so republish them as to avoid an infringement of Myers' copyright; they so stated to Myers upon every occasion when the question arose; therefore, notwithstanding, Mr. Myers was under no legal obligation to warn Callaghans against infringing upon his copyright, yet, had he been, he would not have been required to speak more fully upon the question.

Mr. Myers had the right to assume and believe from these statements of the Callaghans, that they did not propose or intend to infringe his copyright.

It was while so relying upon this statement of the Callaghans that Myers wrote his note of December 1, 1877, to Callaghan & Co., quoted by counsel. (Appellant's brief, 83.)

This note is not sufficient in itself to prove consent or to show that Callaghans published or reprinted with Myers' approval. Counsel asserts that this note was written after all volumes from 32 to 38 had been reprinted and were on the market.

George L. Myers further testified (Trans., 341):

"*A. P. Callaghan said he knew a way by which the copyright could be avoided* * * * WITHOUT INFRINGING ON THE COPYRIGHT."

This evidence is not contradicted. Myers, therefore, had the right to rely in good faith upon the statements made by Callaghan, that if Myers refused to sell, and they proceeded to publish volumes 32 to 38 inclusive, they would do so in such a manner as to entirely avoid

and not in anywise infringe his copyrights. I insist that a fair construction of Myers' note to Callaghan & Co. in the light of this testimony is a conclusive answer to the construction given it by counsel in argument. As above stated Myers only purchased three copies.

In this note Myers, speaking to Callaghans, says: "You (Callaghans) did a month ago," etc., advance the price on volumes 1 (Breese) to 38, inclusive. Myers knew they were the owners of these volumes up to 32 before they had attempted to purchase from him 32 to 38. He knew they had re-published 32 to 38. At that time he relied upon Callaghan's word, therefore believing that they had been so published as not to invade his copyright, as they said they would do. The note is dated the 1st, and the bill filed on the 17th of December, 1877. Will this court presume without a word of proof, that, notwithstanding the negotiations by appellants with appellee for the purchase of his copyright of volumes 32 to 46, his refusal to sell, their expressed purpose to appellee that they would publish without infringing his copyright, that Myers in this note of Dec. 1, 1877, 17 days before filing this bill, referred to pirated copies of his books and intended to surrender his rights to appellants in volumes 32 to 38 and in his copyright thereto? The last volume of the reports from 32 to 38 was completed and issued by appellants November 19, 1877, eleven days before the date of this note.

The construction placed by counsel upon this note is disputed by all the testimony we have recited against the charges of consent, acquiescence and approval. But in the view taken by counsel, could not Myers treat volumes 32 to 38 as reprinted by the Callaghans as their physical property without estopping him from asserting

that they were infringements, especially when he notified them he would prosecute them if they did infringe? So far as the volumes themselves were concerned, the paper and binding, they were the property of the Callaghans and would so continue unless a forfeiture thereof should be judicially declared.

But property in copyrights does not depend for protection upon so uncertain a tenure. The infringer acts at his peril.

George L. Myers further testified (Trans., 342):

"A. I think Andrew P. Callaghan was in the store in March sometime. He renewed the offer he had made, whatever the amount was, and said that unless it was accepted right away that they would contract to have the work done vigorously. He (father) said if you intend to do the work as you proposed fairly I don't see that I can object to it, *but if you interfere with my rights and attempt to make my property worthless I will prosecute you.* HE TOLD THEM IF THEY INFRINGED HIS RIGHTS IN ANY WAY THAT HE WOULD PROSECUTE THEM. THAT WAS THE LANGUAGE USED AS NEAR AS I CAN GIVE IT."

Mr. Myers supposed at this time that a report of the opinions of the Supreme court could be so published as not to infringe his copyright, and so he said to them that if they published them fairly he would have no right to complain; they were expressly assured that any infringement on his copyright would be met with prosecution. Does this indicate consent, acquiescence or abandonment?

This witness further testified (Trans., 342):

"Q. Did that conversation have reference to volumes 39 to 46?

"A. It had reference to volumes 32 to 46."

Murray, bookkeeper Legal News Company, testified:

"The Legal News Company printed for Myers 37th

volume of the Illinois Reports. It came on our job book May 15th to 22nd; it was finished July 24, 1877, and charged on that date.

"A. We printed both volumes for Callaghan, 37 and 38. 37th came in August 15, 1877. (37th finished Sept. 11, 1877, and 38 finished Oct. 12, 1877.) We did press work for Myers' volume 38. It was finished July 24, 1877." (Trans., 357.)

As to Callaghan's volume 37, witness testified:

"It came in on job book August 15, 1877."

Thus it appears, without dispute, that Myers' volumes 37 and 38 were both printed and on sale before Callaghans commenced their copies. Callaghans admit they knew Myers was having these volumes re-printed while their work was in the Legal News Company, so that knowledge of the re-publication of these volumes of Myers' came to them prior to July 24th, as his books were then out. Long before this date Myers had issued his postal circular in which he expressly and unequivocally claimed the copyright, and announced two of his volumes. He issued several thousand of these circulars, and one of appellants testified that no circular could have been distributed without his knowledge.

In the presence of this admission counsel asserts, that although Myers published his volumes first, appellants immediately followed with the re-publication of the corresponding volumes upon the assumption that Myers had abandoned his copyright to such volumes, the reprinting of which had just been finished. Concerning the reprinting of Myers' volumes by Bradwell, Bernard Callaghan testified:

"The fact is, we had a quarrel with Bradwell over it; he asked us to let him up on our work, on some Illinois

Reports that we were printing. We did let up, and we learned afterwards to our chagrin that it was one of those volumes for Myers.

"Q. Either 37 or 38?

"A. Yes, sir. We thought it was other works that Bradwell wanted us to let up on, and when we found it was not, we were very angry with him about it."

"*Angry*," notwithstanding they were relying upon the silence, acquiescence, inaction and abandonment of Myers? In the presence of these facts it requires a most reckless witness to testify that appellants did not know Myers was reprinting his volumes, and that while he was so reprinting them, while they were offering $5,000 therefor, he was steadily and persistently abandoning them, and was consenting to and acquiescing in their republication of the same books, yet their books were sent to the same press (volumes 34, 36, 37 and 38) after Myers' books were printed and placed upon sale. Under this testimony the citation of authorities ought not to be required to establish and determine the impotency of these extraordinary and imaginary defenses.

Mr. Drone, at page 508, states the rule that "the defendant must show that he has acted with the express or implied consent of the owner of the copyright, and such consent is not proved by the mere fact that the owner was long aware of the piracy without protesting against it. * * * The defendant will not be allowed to escape the legal consequences of his wrongful acts by pleading mere delay or lack of protest on the part of the plaintiff. No person has a right to use property without the consent of the owner, and when he does so, he must suffer the consequences."

Section 10 of the act of 1831, under which these copyrights were acquired by Myers, among other things, provides:

"If any other person or persons from and after the re-

cording of the title of any book or books, according to this act (not after the deposit of a copy of the book with the clerk), shall within the term or terms herein limited, print, publish or import, etc., WITHOUT THE CONSENT OF THE PERSON LEGALLY ENTITLED TO THE COPYRIGHT THEREOF, FIRST HAD AND OBTAINED IN WRITING, SIGNED IN THE PRESENCE OF TWO OR MORE CREDIBLE WITNESSES, or shall, knowing the same to be so printed or imported, publish, sell or expose to sale, or cause to be published, sold or exposed to sale, any copy of such book without such consent in writing, then such offender shall forfeit every copy of such book to the person legally at the time entitled to the copyright thereof."

Drone, at page 503, states the rule and cites authorities in support, that:

"Even if the owner is aware that another person is preparing a work, which will infringe his copyright, he is not bound to assert his rights until the piratical book has been published. * * * A person who commits piracy cannot justify the wrong by the plea that he had no warning not to do it. In law and in equity, he is sufficiently warned by the fact that what he appropriates does not belong to him."

The security of Myers' copyright did not depend on his failure or refusal to reprint volumes 32 to 38 inclusive, from 1871 to 1877. The life of the copyright is expressly fixed in terms by the law of Congress, and is not made to depend upon the republication of the original edition. The appearance of volumes 32 to 38, inclusive, in Myers' catalogue during the years referred to by counsel, without prices, requires no explanation from Myers. The protection of a copyright against piracy does not depend upon catalogues or advertised prices of books secured by copyrights. The provision of the act of Congress above quoted, clearly and emphatically warned the Callaghans against attempting to republish these volumes *with-*

out the written consent of Myers. Without such consent in writing, without any consent and against the protest of Myers, with the warning of Myers not to infringe his copyrights, they proceeded to the republication of these volumes. They took the risk and thus the circuit and district judges of the court below upon a most careful and exhaustive examination and review of the evidence and the law, judicially found and declared that they must answer in damages for the wrong they had committed.

All the negotiations for purchase as testified to by appellants, extended to and included volumes 32 to 46, yet, as to volume 40, Bernard Callaghan testified, transcript 497:

"Q. Do you wish to be understood that volume 40 was not included in your advertisement of Illinois Reports?

"A. I do not know but what it was originally; when we found there was trouble over it after it was manufactured we stowed it away, secreted it—in other words, did not make known the fact that it was printed."

This volume was printed in December, 1877, and as appears upon one of its first pages, appellants attempted to copyright the same. Appellants were as fully authorized by Mr. Myers, and equally justified by any act or word of his to print and publish this copy as either of the other copies from 32 to 46, inclusive.

The conduct of appellants thus testified to with respect to volume 40, is conclusive evidence against any reliance on their part upon the conduct or words of Mr. Myers as constituting authority to print or publish any of the volumes in question in violation of his copyright.

NO LACHES CAN BE IMPUTED TO APPELLEE.

The rule upon this point is clearly stated in Drone, at page 505:

"The burden of showing that the plaintiff was aware of the piratical publication, is on the defendant. 'The plaintiffs have to purge themselves from the imputation of laches, but the *onus* of proving the laches is on the defendants. They must show a clear knowledge in the plaintiffs of the former infringements, and of their having put up with them for a length of time, if they wish to fix the plaintiffs with the consequences of that laches, so as to prevent them from having protection against any other depredations.'"

Wood, V. C., *Chappel* v. *Sheard*, 1 Jur. N. S., 997.

The record shows a continued infringement of appellee's copyright to fifteen volumes, and before the reprint of half of the number was completed, he filed his bill, and before the case was closed, asked, and was granted, leave to file a supplemental bill to bring before the court infringement that occurred after the commencement of the suit, and later, by amendment, volume 40, pirated, reprinted and "*secreted*" by appellants, was brought before the court, and yet appellants insist that appellee lost his rights not only in the volumes published but a short time before this suit was brought, but also in the volumes that were reprinted and completed after the suit was brought. No case has been cited by counsel and we confidently assert that none can be found in which the prosecution of a case attended by the circumstances and evidence appearing in this record, has been held barred by laches.

The act of Congress gives two years within which the

injured party may consider whether he will prosecute for the infringement or not.

Even if there had been entire silence on the part of Myers, and even though he had not reprinted nor intended to reprint any of his volumes at that time, his rights under the act of Congress would not have been effected thereby. The owner of a copyright is not required by the law that secures it to him, to keep constantly on the alert and to guard his rights by a threat to prosecute every infringement.

In *Wheaton* v. *Peters*, *supra*, this same defense was interposed on behalf of the infringer. The learned counsel, Mr. Sargeant, in the course of his argument, said:

"Mr. Peters undertakes to prepare the work. He announced his intention to do this publicly and fully explained his plan. No efforts were made to stay this proceeding until invited by him, and after he had completed the third volume of his work."

Yet, the court neither recognized this defense nor noticed in its opinion this point of counsel.

In *Emerson* v. *Davies*, 3 Story, 772, the defendant pressed upon the court the fact that he had issued several editions of the work claimed to be infringed, "but that every page and part thereof charged by complainant to have been copied or taken from his book, was published in the first edition of the book of defendant, and has remained in every edition unaltered. And that complainant became acquainted with the contents soon after the same was first published, and never made any complaint or intimated that his copyright had been invaded until the bill was filed."

How much stronger case of acquiescence, consent, silence, abandonment and laches is here presented, than in the case at bar? Yet the court again treated this defense, although pressed with great emphasis and assurance, with-

out consideration, as utterly insufficient and as not deserving of consideration.

In *Little* v. *Gould*, 2 Blatchf., 169, it appeared that the parties charged with the infringement notified certain officers of the state that they intended to republish the reports involved in that controversy, and after giving such notice in writing, "they proceeded with their enterprise therein mentioned, and prosecuted the same in the city of Albany—where the plaintiffs and the state officers also resided—without being notified by either of any objection to the further prosecution of their undertaking."

Justice CONKLING, in delivering the opinion of the court, administers the rebuke seemingly deserved, and said:

"There can be no injustice in assuming that they (defendants) have acted with full knowledge of all the facts. Their extraordinary letter shows this. They are chargeable, therefore, not only with a wilful and apparently very discreditable encroachment upon the plaintiffs' rights, but with openly arraying themselves against the supreme authority of the state. There may possibly be circumstances growing out of a spirit of rivalry between the parties affording some palliation for conduct apparently so unjust and *audacious;* of this I know nothing, and it may at least be safely assumed that they can furnish *no shadow of justification to the defendants.*"

The first volume reprinted by appellants was issued about June 1, 1877, when they claimed they had arranged and were actually engaged in printing all the volumes; that at the time the original bill was filed (December 17, 1877) they had completed the reprint of over one-half of appellee's volumes. Appellee brought suit when the wholesale infringement was little more than half completed, and now the infringers assert that appellee is guilty of laches by not commencing suit at an earlier day. At what point in the reprint of appellee's vol-

umes by appellants should the suit have been commenced, in order to have avoided the defense of laches within the rule as contended by counsel?

In *Emerson* v. *Davies, supra, held that a bill filed after the reprint of the third edition of the pirated work was in apt time.*

There is no pretense that they were damaged in any degree or misled in any respect by appellee not filing his bill sooner. On the contrary, the filing of the bill did not stop appellants from continuing and completing the reprint and republication of more than one-half of the volumes which they repeatedly declared they proposed to reprint, but in such a manner as to avoid an infringement of appellee's copyright.

Is it not reasonable to presume even if there was merit or ground for this defense, from the fact that they continued to infringe (after the original bill was filed) the copyright of nearly half the volumes, that such infringement would not have been arrested if the bill had been filed before the first volume was completed?

Bernard Callaghan testified that in the June interview, Myers said he did not care what they did with volumes 32 to 38. This statement of the witness is an evident mistake. Myers directly contradicts him, and Callaghan's partner who was present at this interview and no doubt intended to hear all he could in their favor, makes no mention of any such statement having been made by Myers. Aside from this fact, Myers at that time had been for several months at work on these volumes and they were almost ready for issuance, *and this purpose to republish had been advertised in the Freeman-Myers circular and seen by the Callaghans in February, 1877, before they had taken the*

first step toward reprinting. It is impossible—absurd to assume, under such circumstances, Myers would voluntarily tender and surrender to his enemies in the trade, his copyright to the very volumes they had repeatedly solicited him to sell, which he had refused to sell, and which he had republished knowing they would not pay him his price therefor, and had advertised them to the trade and profession, especially when they had repeatedly declared they would crush him if he did not sell upon their terms.

A careful review of the cases cited by appellants show that they are wholly unlike the case at bar, and cannot be regarded as authorities governing this case.

Saunders v. *Smith*, 3 Myl. & Cr, 711, is cited as being "directly in point." We fail to perceive anything but a faint analogy between the features of that case and the case at bar. It was an application for an injunction to restrain the defendant Smith from publishing the first part of volume 2 of Smith's Leading Cases, on the ground that the text of the cases contained in said work was pirated from Term Reports, East's Reports, Barnewall and Cresswell's Reports, Taunton's Reports, and Bingham's Reports, copyrights of all which were owned by the plaintiff. The defendant Smith set up that the composition of the notes and commentaries on the original text of the cases was the most laborious and important part of the work, and were wholly original with the author, Smith; that the cases taken from the reports were intended as illustrative of a principle of law on which a commentary or exposition was contained in notes appended to such cases, and which notes had been composed with great labor, and were very lengthy as compared with the original cases. The first volume was published in March,

1837, and it contained in the preface an announcement, which was held to be notice to every one, that a second volume would in time follow.

The Lord Chancellor, in his opinion, constantly dwells on the fact that the plaintiff had not first established his legal right in the property sought to be protected. The court says:

"The office of the court is consequent upon the legal right; and it generally happens that the only question the court has to consider is whether the case is so clear and so free from objection upon the grounds of equitable consideration, that the court ought to interfere by injunction without a previous trial at law, or whether it ought to wait until the legal title has been established."

In this case the legal title had not been established, and the court in its decision is governed by the fact that Smith's Leading Cases was a work of an original character. The Lord Chancellor says (page 728):

"In this case I find the publication complained of, to be of a character which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty largely admitted, and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar, desirous of publishing a work upon a particular subject, has collected the cases upon that subject, and has taken those cases, generally speaking, verbatim, from reports which are covered by copyright. No instance has been represented to me in which those entitled to the copyright have interfered. I am not stating whether the owner of the copyright is entitled to interfere in such case, or whether that use of published reports is, or is not, to be permitted. That is a question of legal right upon which I find at present no reason for coming to an adjudication. But in considering whether I am to exercise an equitable jurisdiction in such a case before the legal right has been established, it is very important to observe that for many years such a course as I have

stated has been pretty generally adopted, more particularly when I find that these plaintiffs have themselves acquiesced in a similar course of proceeding. In a book which was mentioned in the course of the argument, I mean Chitty on Bills, I don't know whether all the cases are printed verbatim, but certainly many cases are printed varbatim from the published reports, of which the plaintiffs have the copyright. I state this case not for the purpose of showing that the proceeding I have stated interfered with the legal right, *but for the purpose of considering whether I ought to exercise jurisdiction by injunction before that legal right is established.*"

The court also dwelt on the fact that the first volume of Smith was published in March, 1837, and that it contained an announcement in the preface, that it would be followed by a second volume. This, the court held, to be notice to the plaintiffs of that fact, and that they waited more than a year before seeking relief. (The bill was filed May 29, 1838.) The learned chancellor, on page 734, says:

"When I look at this book I see that it is a work of very great labor, and I find the principle is to take first the marginal note, sometimes with some alteration, and then to take the leading case as a *principle*, and then *by very voluminous and obviously laborious notes to work out the principle.* It is clear, therefore, that the work is one of great labor, and that this was evident from the first volume, and I find that the plaintiffs were informed in March, 1837, of an intention to deal with the existing reports in the manner now complained of."

And in concluding this opinion, the Lord Chancellor says:

"The court always exercises its discretion as to whether it shall interfere by injunction *before the establishment of the legal right.* I am quite clear that the vice-chancellor was right, and that it is not the duty of the court to interfere by injunction in this case, *at all events in the present stage of the cause*, and therefore I must refuse this motion, with costs."

The court in this case was evidently influenced in the main by the fact, 1st, that the plaintiffs had not established their legal rights, and before the establishment of such rights no relief would be granted, and this is the meaning of the language "*at all events in the present stage of the cause.*" 2d. The decision goes largely upon the fact that "Smith's Leading Cases" is in the nature of an original work, and that works of a similar character had been written or compiled and published by members of the bar, without objection, alluding, among others, to Chitty on Bills, and that said works were in the nature of text books of the law, and in the instance of Chitty on Bills many cases were printed verbatim from the published reports in which the plaintiff owned the copyright, and this without objection on their part.

Beard v. *Turner*, 13 L. T. R. N. S., 746. This was a case of *trade-mark*, and the court says:

"I know of no instance in which the court has given relief with reference to a trade-mark, except on a prompt application."

It was sought to restrain the use of a certain label on packages of needles. It appeared that the plaintiffs and defendant had exhibited their needles side by side at the London Exhibition, and there had been no objection or protest on the part of the plaintiffs. The bill was brought more than two years after this knowledge on the part of plaintiffs, and the court refused to grant an injunction, on the ground that large expenditures in making the label had already been made by defendants for a period of over two years, acquiesced in by plaintiffs. It appears also that the relief asked was mainly for an account of the profits made upon the sale of the goods covered by the imitated trade-mark. The court held it would be inequitable for the plaintiffs to say:

"I will let the defendant go on four or five years, and then at the end of the time say he is my salesman, and I come in for my account of the profits."

Louis v. *Chapman*, 3 Beav., 133.

In this case a period of *six and a half years* had elapsed before bill filed, and the court refused to grant relief on ground of laches, although considerable use had been made by the defendant of plaintiff's book, in writing and publishing theirs.

Tinsley v. *Lacy*, 1 Hem. & M., 747.

This case was entirely different from the case at bar in all of its facts and doctrines, except the short *dictum* in the decision quoted in appellant's brief.

Rundell v. *Murray*, 3 Jacobs, 311.

In this case a certain manuscript was donated or given by the plaintiff to a publisher, who, at the time, published it with the statement that she, the defendant, would not and did not wish to receive any emoluments therefor, whatever, but it seems the plaintiff had made her a gift of some money (purely *ex gratia* on his part). The plaintiff, relying upon the gift, published and sold the manuscript for *fourteen years*. After this lapse of time, namely, fourteen years, it was sought to restrain the publication of the work, by injunction. Lord Eldon refused the injunction under such circumstances, and after such lapse of time, holding that the conduct of the party complaining had led to the state of things that occasioned the application. It was undisputed in that case that the defendant had given or donated the manuscript to the publisher, and waited fourteen years before applying for relief.

Platt v. *Button*, 19 Vesey, 447.

In this case the plaintiff permitted the defendant to publish certain dances for *fifteen years*. Lord Eldon, in refusing an injunction in this case, says:

"If, as is represented, some of the dances were published only last year, and one two months ago, the bill "ought to be confined to these."

Baily v. *Taylor*, 1 Tamlyn, 295.

In this case the work sought to be enjoined was published in the year 1811. The bill for injunction was not filed until the year 1829. It also appeared that only *one three-hundredth* part of the plaintiff's work had been pirated. After a lapse of *eighteen years* and the difficulty of ascertaining the amount of damage occasioned by stealing *one three-hundredth part* of a work, the court refused to grant any relief.

Johnson v. *Wyatt*, 11 Weekly Rep., 852.

This case bears no resemblance whatever, in any of its facts, to the case at bar, nor can the principles governing that case be so contorted as to apply in any way to this case. The facts were, that the defendant had erected a kind of glass structure or room for a photographic studio, and had given the plaintiff three weeks' previous notice of its intended erection, which would necessarily interfere, to some extent, with certain ancient lights and air on the plaintiff's premises. To this notice the plaintiff paid no attention. Defendant thereupon made his plans, contracts, etc., for the erection of the studio, and after the work had partly progressed, plaintiff filed a bill to restrain the erection of the building. It was held that the plaintiff must take the consequence of his own negligence, and failure to assert his rights after direct notice had been given, and after defendant had gone to considerable ex-

pense, and had already made his contract for erection of the studio.

The other cases cited by counsel, in support of this defense, wholly unsupported by the evidence, do not decide the point claimed upon the actual facts appearing in the record. Many cases might be cited in support of my position and against this defense. Counsel is forced to rely for authority in support of this defense upon *ancient* English cases.

In Drone, page 508, upon a careful review of the authorities upon this subject, the learned author says:

"But the tendency of more recent decisions has been towards the doctrine that the plaintiff's rights in equity are not lost by mere delay in asserting those rights. The defendant must show that he has acted with the express or implied consent of the owner of the copyright; and such consent is not proved by the mere fact that the owner was long aware of the piracy without protesting against it, or that he has not chosen sooner to assert his rights in a court of law or equity against either the defendants or any other wrongdoer. In other words, the principle seems to have been recognized, though it may be going too far to say that it is established, that the defendant will not be allowed to escape the legal consequences of his wrongful acts by pleading mere delay or lack of protest on the part of the plaintiff. No person has a right to use property without the consent of the owner; and, when he does so, he must suffer the consequences."

Citing, *Green* v. *Bishop*, 1 Clifford, 183.

The author refers to the opinion of the court in *Hogg* v. *Scott*, and says, page 509:

"The court held that, even if the plaintiff had been aware of the piratical nature of the defendant's book for four years before beginning suit, he was not thereby deprived of his remedies in equity. 'The omission to take any proceeding at law or in equity for a time,' said

Vice Chancellor Hall, 'does not in itself appear to me an encouragement to the defendant amounting to an equitable bar in this court. It is not enough to show that the legal right is not to be protected here.' 'Knowledge by the plaintiff that the defendant was advertising his work which contained the objectionable matter, and that he was going on selling it, does not appear to me to amount to that description of acquiescence in the defendant's dealing with the subject-matter, which must be taken to deprive the plaintiff of the interference of this court as from any given time.'" Citing in the note *Hogg* v. *Scott*, L. R. 18 Eq., 454, 456.

Two editions of the book had been published by the infringer to the injury of the owner of the copyright, and yet he waited before commencing suit until a third edition was threatened, yet the chancellor held:

"I have, therefore, come to the conclusion that the plaintiff's right in this court has not been taken away by what has occurred."

How did Myers have notice, and in what did his acquiescence consist? They notified him they intended to republish his books if he refused to sell; that there was a way to republish without infringement, but they did not pretend in any conversation, nor at any time, that they ever in any way notified Myers that they would use his book in such republication. All matter contained in these books, appellants assert is public matter. We contend, not that like materials for Illinois reports could not be procured by resorting to the original source, but our contention is that appellants prepared the books republished by them from the books of appellee. This is the gist of the charge. Appellee had a right to presume that appellants' publication would be a legal use of materials procured by them from original source.

In *The List Publishing Co.* v. *Keeler*, 30 Fed. Rep.,

772, the complainant had compiled and copyrighted a directory called "The List." He charged in his bill that the defendant's directory called "The Social Register," was an infringement and moved for an injunction. The court held:

"The question in the case is whether the defendant, in compiling his directory, has done so by his own original labor, or whether, in order to spare himself time and expense, he has copied the names and addresses given in the Social Register from the List. If he has copied any part of the complainant's book, he has infringed the copyright. He has no right to take, for the purpose of a rival publication, the results of the labor and expense incurred by the complainant, and thereby save himself the expense of working out and arriving at these results by some independent road." Citing *Morris* v. *Ashbee*, L. R., 6, Eq., 34.

Equitable limitations and estoppel should be favored in all cases requiring their interposition to prevent injustice, but as defenses in this case, they would not only violate the most salutary principles of equity, and visit upon appellee the grossest injustice, but would interfere and shorten the two years' limitation fixed by Congress, in the law of Congress to control such cases.

In the light of this record can appellants *pose* as innocent parties?

A. P. Callaghan testified (page 147): "It was in consequence, or somewhat in consequence of his (Freeman's) announcement at that time that we made the counter-announcement of 19 to 38 at that time, but we had resolved before to print them, *and we determined to print them long before we saw his announcement.*"

This fact alone destroys these defenses of supposed consent, acquiescence, etc.

They had determined to print long before they saw this

"announcement," and began to carry out this determination before Mr. Myers did *any of the things* or *said any of the words* they now seek to *torture* into consent and encouragement, etc.

V.

THE COURT BELOW FOUND AND DECREED THAT THE APPELLANTS' REPRINTS OF VOLUMES 32 TO 46 INCLUSIVE, WERE INFRINGEMENTS OF APPELLEE'S COPYRIGHTS.

The evidence in the record clearly supports this action of the court below. *A casual inspection and comparison of copies of Freeman's edition, with corresponding copies of appellants' reprints now before the court will alone convict of piracy.*

Counsel substantially admit (as I understand his position), that volumes 32 to 38 inclusive, with the exception of the foot-notes, were "prepared entirely from the Freeman volumes," but he contends that volumes 39 and 41 to 46 "were, with the exception of the opinions of the judges, prepared from the records and files of the Supreme court of Illinois."

I will not attempt to review counsel's argument in detail nor adopt his mode by giving my version of the testimony, but will place before the court the evidence in the language of the witnesses touching this question.

Mr. Hill testified, trans., 102: "The paging was substantially the same in either edition. The reports of cases, the statement of the case are oftentimes abridged and changed, but substantially the same matter and an occasional change in the phraseology. Practically I found them interchangeable. I could use the one as well as the other. For example, the reference to 34th Illinois in

any of the law books or briefs of counsel I could find, quite as well in the edition of Callaghan as in the edition of Myers, and the same facts as to each of the other volumes of the reports named."

Ewell re-edited 31, 32, 33, 34, 35, 36, 44 and part of 45, which he delivered to the printer within the following time, namely, the notes on volume 31, February 20th, finished it March 31st; volume 32, on March 31st, finished it May 2d; volume 33, May 3d, and finished it May 26th; volume 35, May 28th, and finished it, excepting index, June 26th. Usually took two days to finish the index. The next volume, 34, June 28th, finished it July 23d; the next volume, 36, July 26th, finished it September 15th, having spent a few days in the meantime on the index of the other volumes.

Mr. Ewell further testified (Trans., 400): "I prepared volume 44; I prepared the head-notes, the syllabus, the statements of the cases, and they were all printed. The work on 45 was suspended by the filing of the bill."

Speaking of the preparation of the head-notes, for volume 44, witness testified (Trans., 402):

"A. *I had the Freeman-Myers volume there.*

"Q. *And derived assistance from it?*

"A. *Yes, of course I had it, I could not get the opinions in any other place but to read them from the printed* book. I DID NOT GO TO OTTAWA TO PREPARE THEM, *but prepared them in my own room.*

"Q. Did you have any other material from which to prepare the foot-notes, as you prepared them, except the book of Mr. Freeman?

"A. That and the digest of the other reports, was all."

This witness testified that at the time the bill was filed the entire volume of 44 and part of 45 were in type.

As to appropriating the statements of the arguments of

counsel as prepared and printed, in Freeman and Myers' volumes, and reprinted in Callaghan's volumes, this witness testified (Trans., 403):

"A. *They were statements of facts*; MY RECOLLECTION IS THAT THE ARGUMENTS OF COUNSEL WERE CUT OUT ENTIRELY; that is my recollection; THAT IS THE WAY I PREPARED THEM. I don't know how it is in the printed volume.

"Q. *In the statements of facts which you used were all those statements taken from Mr. Freeman's volume?*

"A. THE INFORMATION WAS DERIVED FROM HIM."

This manner of using the material in Freeman's volumes apart from the opinions themselves extended to and was adopted in the preparation of all the volumes re-edited by this witness. No plainer or more conclusive case of piracy could be made. Not only the material prepared by Freeman was appropriated, but his printed pages were used by the compositors, to save the pirates the cost and expense of copying. They not only appropriated the work of Freeman's brain and hand but his printed pages to have the reprints made from them directly.

The authorities all agree that it is piracy for the second editor or publisher to appropriate the work of the first editor or publisher, although all the materials common to both books might have been procured from other sources.

The rule stated in Curtis on Copyright, p. 253, is that:

"The main question in all such cases is whether the author of the work alleged to be a piracy *has resorted to the original sources, alike open to him and to all writers.*"

Bump on Copyright, 358:

"No compiler of a book, which is a mere compilation of facts from common and universal sources of informa-

tion, has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. *But the subsequent investigator must investigate for himself*, FROM THE ORIGINAL SOURCES WHICH ARE OPEN TO ALL. *He cannot use the labors of a previous compiler, animo furandi*, AND SAVE HIS OWN TIME BY COPYING THE RESULTS OF THE PREVIOUS COMPILER'S STUDY, *although the same results would have been obtained by independent labor*."

But in this case the poor pretense of copying—the first shadow of original work, is not shown, or claimed.

In *Lawrence* v. *Dana*, *supra*, Justice CLIFFORD held that:

"Beyond all doubt, he (second author or editor), might take the old materials as found in the sources from which the matters of fact, citations and authorities of the complainant were drawn and use them as he pleased in the illustration of new and original propositions, or for any other purpose not substantially the same as that to which they are applied in the annotated editions edited by the complainant; *but he could not borrow the materials as therein collected and furnished, nor could he rightfully use the plan and arrangement, or the mode by which they are combined with the text*."

Lewis v. *Fullerton*, 6 Beav., 6.

Hogg v. *Kirby*, 8 Ves. Jr., 221.

In *Story's Exrs.* v. *Holcomb et al.*, 4 McLean, held, page 306:

"So far as citations are made in the commentaries, Mr. Holcomb had a right to *go to the original works* and copy from them; *but he could not avail himself of the labor of Judge Story* BY COPYING *the extracts as compiled by him. This is a well established principle*."

In *Banks* v. *McDevitt*, 13 Blatchf., 161, an infringement of a copyright for a book called "Rules and Prac-

"tice of the Supreme Court of New York," had been infringed by the defendant. In publishing the book the defendant copied certain portions, and added to them from his own research. An injunction was granted and made perpetual. The court held (page 161):

"No compiler of such a book has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But the *subsequent investigator* must investigate for himself, from the original sources which are open to all. He cannot use the labors of a previous compiler, *animo furandi*, AND SAVE HIS OWN TIME BY COPYING THE RESULTS OF THE PREVIOUS COMPILER'S STUDY, ALTHOUGH THE SAME RESULTS COULD HAVE BEEN ATTAINED BY INDEPENDENT LABOR. The compiler of a digest, a road book, a directory or a map, can search and survey for himself in the fields which all laborers are permitted to occupy, but cannot adopt as his own the products of another's toil."

See to the same point, *Blunt* v. *Patton*, 2 Paine, 396.

In *Emerson* v. *Davies*, 3 Story, 782, Mr. Justice STORY in the consideration of this question held:

"It is a great mistake to suppose because all the materials of a work or some parts of its plan and arrangements, and modes of illustration, may be found separately or in a different form, or in a different arrangement in other distinct works, that therefore, in the plan or arrangement, or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer, of it (call him which you please) is not entitled to a copyright. The reverse is the truth in law, and as, I think, in common sense also."

Drone, page 385, in defining a piracy, says:

"The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced;

not whether the whole, but whether the material part is taken. *In this view of the subject, it is no defense of piracy that the work entitled to protection has not been copied literally;* * * * that the whole has not been taken; that it has been abridged."

Page 423: "But every compiler is bound to go to the common sources for his materials, and arrange them on a plan original with himself. *He must himself do the work and depend on his own skill,* AND NOT SAVE HIMSELF LABOR AND EXPENSE BY APPROPRIATING THE FRUITS OF ANOTHER'S INDUSTRY IN LEARNING. To constitute piracy in cases of this kind it is not necessary that the whole of the compilation shall be taken, or that *verbatim* copying shall be shown. The same general tests apply here as in the case of an original work. A case of infringement may be made out when the substance of the whole, or of a material part of the compilation has been appropriated."

Farmer v. *Calvert L. & P. Co.*, 5 Am. L. T. R., 174.

These rules and authorities establish the principle that the use of matter, work, or arrangement collected or organized by another although not entirely original is piracy. The evidence before the court brings the infringement charged directly within the rule stated by Judge McLean, in *Story's Exrs.* v. *Holcomb et al.*, 4 McLean, 306, that is, if it is shown that appellants in this case in the reprint of the books in controversy used the books of appellee, appellee is entitled to relief upon "*the well established principle recognized*" in Story's Exrs., *supra*. And it is immaterial whether the original matter in appellee's books such as index or syllabus were copied or even imitated. Appellants substantially admit by the most evasive and partial denial that their books were made solely or substantially from those of appellee, with a small addition, as they claim, of some new matter and work.

Robert Fergus testified (Trans., 99), that he was in the

printing office of David Atwood in June, 1877 (witness being a printer), saw parts of volume 35 in the office and in the stereotype foundry; saw other parts of the same volume.

"The copy was that of Freeman's edition published by Myers. It was being used as a copy for the compositor. There was a piece of manilla paper pasted over the slips, and a new one written over it."

It is admitted that the actual bound volumes of appellee's books were furnished the printer and used by the compositor in putting in type the opinions as they appeared in appellee's books. A comparison of the books is conclusive of the fact that appellants' books were made from the volumes of appellee with only colorable changes.

At this point in argument, I call the attention of the court to the following comparison of paragraphs of the syllabus in volume 33, page 9.

(The words printed in italics are identical in appellant's and appellees' books):

MYERS'.	CALLAGHAN & CO.'S
(1). "*The alternative writ of mandamus stands in the place of a declaration.*"	"*The alternative writ of mandamus stands in the place of a declaration.*"
(2). "*A demurrer to the return* to an alternative writ, may relate back to the writ itself, and brings that before the court for its consideration."	"Where the *alternative writ* does not state a prima facie case, *a demurrer to the return* thereto will have the operation of a demurrer to the writ, and will bring in question its sufficiency."
(3). "*The writ of mandamus is a high prerogative writ, to be awarded in the discretion of the court.*"	"*The writ of mandamus is a high prerogative writ;* it is not a writ of right, but it is *to be awarded in the discretion of the court.*"
(4). "The statute requires *the speaker of the House of Representatives to give a certificate to each member of the amount of compensation to which he is entitled, on presenting which to the auditor, he is authorized to issue* his *warrant for the amount specified in it, in the revenue fund.* He *is not authorized to pay a member in any other* way."	"Under the statute requiring *the speaker of the House of Representatives to give a certificate to each member, of the amount of compensation to which he is entitled, on presenting which to the auditor, he is authorized to issue* a *warrant for the amount specified in it, on the revenue fund;* while the auditor *is not authorized to pay a member in any other* mode."

In this case twenty-four pages of Myers' books are filled with copies of the writs, etc., necessary to a proper report of the decision, *all of which is copied entire by the defendants:*

MYERS' EDITION.
Vol. 33, p. 182.

(1). "EVIDENCE IN CHANCERY *must be preserved.*

"The evidence upon which *a decree in chancery is based, must, in some manner, be preserved in the record*, or the decree will be reversed."

(2). "This is especially true in reference to decrees against minors. *Where minors are defendants* to a bill, *a decree can only be rendered against them on full proof.*"

Vol. 33, p. 189.

"CONTRACTS — Whether *joint or several. A contract will be construed as joint or several, according to the interests of the parties approving upon the face of the obligation, if the words are capable of such a construction.*"

CALLAGHAN & CO.'s EDITION.
Vol. 33, p. 182.

EVIDENCE: in *chancery must be preserved* in record.

"In order to sustain *a decree in chancery, the evidence upon which* it *is based must in some manner be preserved in the record.*"

"*Where minors are defendants* in chancery, *a decree can only be rendered against them on full proof.* Such evidence must be preserved in the record."

Vol. 33, p. 189.

"CONTRACTS: construction of, *as joint or several. A contract will be construed as joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction.*"

On page 567–8 of Vol. 35, of Freeman's book, the case of *Taylor* v. *Riddle*, by some mistake was omitted in the table of cases. The same omission is made in Callahan & Co.'s book.

In appellee's book, *Wayman* v. *Cochran* is on page 152; in Callaghan's book on page 151, yet the Callaghan table of cases give the page 152, as in Freeman's.

Volume 38. In table of cases, *Arnold* v. *Ludlam*, is given in appellee's book as on page 191. This is incorrect. It should have been page 190. The mistake is copied in appellants' book.

The name of the appellee in *Kiser* v. *Heuston*, page 252, by mistake in the table of cases, in appellee's book is spelled Henston. This mistake is copied exactly in appellants' book.

Case of *Morgan* v. *Raymond*, in appellee's book is on page 448. In appellants' on page 449, and in table of cases in appellants' book, the number is given as 448, the same as in appellee's.

The same mistake appears on page 443.

These comparisons prove beyond controversy that these mistakes were actually copied from appellee's books into appellants' books, which raises the presumption which courts recognize as almost conclusive that appellants' books were copied from appellee's.

In *Longman* v. *Winchester*, 16 Ves., 268 (marginal page 272), Lord Chancellor Eldon, in the consideration of this precise question, held:

"The question before me is, whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labor has been applied than copying the plaintiff's work. From the identity of the inaccuracies, it is impossible to deny that the one was copied from the other *verbatim et literatum*."

In *Murray* v. *Bogue*, 1 Drew, 366, case cited by counsel, the vice chancellor held:

"Some instances are stated in the bill, and others were stated at the bar, to show that Mr. Bogue has copied the plaintiff's errors, which is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book. Now, the use of showing the same errors in both, is, that where the defendant says he has got his information not from the plaintiff (as asserted by counsel in argument), but from other sources, if the evidence is unsatisfactory on the question whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original, is a strong argument to show copying."

In *Mawman* v. *Tegg*, 2 Russell, 393, 4, held:

"It is necessary to ascertain how much of the one book

has been copied from the other; and many cases have established, that you cannot have better evidence of such copying than the circumstance which occurs in several of the passages here complained of—namely, the fact of blunders in the original book being transferred into the book which is accused of piracy. And I may add that, when a considerable number of passages are proved to have been copied, by the copying of the blunders in them, other passages, which are the same with passages in the original book, must be presumed, *prima facie*, to be likewise copied, though no blunders occur in them."

The court will observe, in the table annexed to this argument, that many inaccuracies have been literally copied from appellee's books into appellants' books—39 to 46.

Mr. Drone, 428, says:

"The occurrence of the same errors in the two publications in controversy, affords one of the surest tests of copying, especially in the case of compilations where a close resemblance is the natural consequence of the use of common materials. In some instances it may be made apparent that both writers have naturally made the same mistakes, but, in general, this result is so improbable that the presence in both works of common inaccuracies, creates a presumption of copying so well grounded that it can be overcome only by the strongest evidence. Hence, in the absence of conclusive proof to the contrary, the courts have uniformly accepted the evidence afforded by such errors, when sufficiently numerous or peculiar, as adequate to sustain the charge of copying."

Numerous cases are cited in note 1, in support of this salutary rule.

The court will observe from the table of comparisons here submitted, that slight colorable changes in the use of words, shortening sentences, etc., are apparent and conclusively appear from a casual comparison of appellee's books with appellants'.

CLIFFORD, Justice, in *Lawrence* v. *Dana*, 4 Clif., 1–88, held:

"Copying is essential to constitute an infringement of copyright, but identity of contents, arrangement and combination, is strong evidence that the second book was borrowed from the first, as it is highly improbable that two authors would express their thoughts and sentiments in the same language throughout a book or treatise of any considerable size, or adopt the same arrangements or combination in their publication."

In *Boucicault* v. *Wood*, 2 Bissell, 38, Judge DRUMMOND, in the charge to the jury, said:

"You must of course be satisfied that the plays performed were the identical plays of which Mr. Boucicault was the author; not necessarily identical word for word, but the principle is, that the author has not the right to use the work of Mr. Boucicault's brain, in the construction of a play, without his consent, *and the mere alteration of a portion of the language would not deprive Mr. Boucicault of his protection, provided there was a substantial use of the play.*"

If appellants' books had been made up with material obtained from sources other than the books of appellee this fact could easily have been shown, and the evidence would surely have been produced. Such proof not being offered, a strong presumption arises that no such evidence exists, because the material was taken from appellee's books.

In *Emerson* v. *Davies*, 3 Story, 791, upon this point Mr. Justice STORY held:

"Now it is quite as remarkable that the defendant, Davies, has not (as far as I recollect), given any evidence as to what sources he has examined in the compilation of his own work; and this, coupled with the fact that he has offered no denial or proof that he has not seen or read the

plaintiff's book, before his own compilation was made, is certainly a circumstance of some significance."

Mr. Ewell testified (Trans., 213): "It was not what you really call copied, but I got my information of the subject-matter from those (Myers') books. I could not say that I copied it out, but I got my information on those points from those (Myers') books.

"Q. Was not a great deal of that material transferred *verbatim* into your books—the names of the counsel, the instructions of the court, and the names of the judges who tried the cases?

"A. Of course I only knew from the report. *I will state I had no other source of information*, except as I stated in my direct examination, where the case had been to the Supreme court, in an earlier volume."

Denslow testified (Trans., 224): "Q. In the preparation of these volumes what material was furnished by anyone?

"A. I was furnished with volumes 37 and 38, as prepared by Mr. Freeman, of Myers' edition.

"Q. By whom?

"A. By Callaghan & Co.; *cut them up into pieces in making up the new volumes.* The compensation was $300 for the two volumes.

"Q. Did you not take it (the material) right out of those books of Freeman? (Trans., 228.)

"A. The documents?

"Q. Yes, all of them? * * *

"A. I used the material as printed in his book.

"Q. They (Callaghan & Co.) knew you did not go to the records, did they not? (Trans., 235.)

"A. Yes, sir.

"Q. State whether in your book the assignment of errors are not all copied from Freeman's—in that case copied verbatim? (Trans., 255.)

"A. Yes; the portion relating to the assignment of errors, which I regard as belonging to Freeman, is the clause, to reverse that decree the defendants bring the cause to this court by writ of error and assign a number of errors. The actual assignment of errors I assume, his statement being correct, is on record, filed by the attorneys in the case, or rather endorsed on the record, and is not private property.

* * * The language in which it is stated belongs to him.

"Q. Do you answer the question as to whether you did copy the errors assigned, from his book?

"A. Yes, I presume without comparing them, that they are identical. * * * Then the use of Mr. Freeman's book, as the medium of getting the copy from Ottawa, does not affect the question of copyright. * * * *I have the right to take it where I can find it and print it.*"

Thus this witness admits he appropriated Freeman's work not only in matter, but in form, to save labor, both of which equally constitute infringement, under the authorities cited upon this point.

This witness further testified:

(Trans., 256): "Q. Turn to page 99 of your book (Vol. 37,) and state how much of the statement, introductory to the opinion, is copied from Freeman's book?

"A. I think that the contract is copied and one instruction, and the balance of the statement of fact is condensed.

"Q. Where did you derive the information as to the court below where this case was tried?

"A. That I derived from Mr. Freeman's book.

"Q. Where did you derive the information as to the names of the attorneys who appeared for the different parties in the Supreme court?

"A. That is in all cases derived from Mr. Freeman's book.

"Q. Had you any other source from which you derived any portion of the material incorporated in your statement?

"A. I did not go to the record for it. I got it all from the opinion or in the statement of facts."

Witness then states that he copied verbatim statements of facts on page 294 from Freeman's book, statement of exceptions and errors assigned, and instructions of the court below, and, in volume 38, copied from Freeman the authorities and points of counsel.

(Trans., 266): "Q. Is it not true that all the authorities cited by counsel in any of the cases here, and only those reported by Freeman, were put into your books?

"A. *None were put into mine that had not been put into Mr. Freeman's.*

"Q. Did you make any new arrangement?

"A. No, sir."

Witness then states that he omitted some of the authorities cited in Freeman's book from his book, and also omitted certain portions of statement of facts; that these omissions caused irregular paging in the new book, so as to correspond with the paging of Freeman's book.

In *Cary* v. *Longman*, 1 East., 358, held "that the defendant had pirated from the plaintiff's book was proved in the clearest manner at the trial. *The printed work itself was made use of by the defendants at the press*, some of it clipped with scissors, with a few slips of paper containing MS. additions interspersed here and there, and some of these merely nominal and colorable."

In *Mawman* v. *Tegg*, 2 Russell, 385, evidence that plaintiff's book was used in arranging the new book for publication and to work from, was held to constitute proof of piracy.

The statute of this state provides and requires that the opinions of the judges of the Supreme court "shall be delivered in writing and filed with the other papers. Such opinions shall also be spread at large upon the records of the court."

These records constitute a common and public source from which to obtain all information touching such opinions. But when the opinions are taken from those records, attended by statements of fact, syllabus or headnotes, indexed or enumerated in tables of cases, and the whole arranged in a volume, numbered and paged, and secured by copyright, such opinions in the book are not public property subject to the free use of the public.

These opinions alone, bound in volumes without head-notes, etc., would not make a valuable book or report. The new matter above enumerated, combined with the opinions under the arrangement furnished by the reporter or proprietor, make a valuable, desirable and salable book, and this new matter and arrangement of the old matter combined with and attending the opinions, was necessary to the success of appellants' publication. This material supplied by Freeman and Myers could not be obtained from the opinion alone, all of which was literally in a great part and substantially as to the residue copied into appellants' book. They admit the opinions were copied from appellee's books, and this admission raises the presumption that other information contained in Callaghan's book was taken from Myers' book. The books of appellants, in comparison with the books of appellee, give conclusive evidence that they were made and copied from appellee's books. While appellants' book is smaller than appellee's, it bears the same number of pages. Thus the irregular paging in appellants' book.

Page 434 of volume 33, Myers', is a statement of a confirmation by the governor. It is copied literally in Callaghan's book, but its position is changed, and it is inserted in a *note*. (See Callaghan's book, page 434.)

On page 483, Vol. 33, Myers, appears "the evidence taken on the hearing, and the decision of the Circuit court appears from the following decree rendered in said cause." Then follows the decree covering five pages with the errors assigned. Callaghan's book contains the same *verbatim*, except the explanatory lines. They omit three lines, and copy five pages.

Myers', Vol. 35, page 180, contains the declaration, the

demurrer, by which oyer of the bond sued on was craved, followed by a copy of the bond declared upon, and that followed by four special causes of demurrer covering about five pages of matter. The bond, declaration and cause of demurrer appear *verbatim* in Callaghan's corresponding volume. The order is changed by giving the bond called for in the demurrer first, and then the declaration followed by the demurrer. This order in Myers' volume is changed in Callaghan's volume for the sole and only purpose of a change.

MYERS' BOOK. Vol. 37, page 429.	CALLAGHAN & CO.'s. Vol. 37, page 429.
"Writ of error to the County court of Livingston county; the Hon. Jonathan Duff, Judge, presiding.	"Writ of error to the County Court of Livingston county; Hon. Jonathan Duff, J.
"The cause was removed into the County Court by appeal, where the defendant appeared and entered his motion to dismiss the suit upon the ground that the justice of the peace who rendered the judgment from which the appeal was taken had no jurisdiction in the case, because the plaintiff sued as an administrator, and the amount claimed exceeded twenty dollars. The court sustained the motion and dismissed the suit. The plaintiff thereupon sued out this writ of error, and now insists that the ruling of the County Court in sustaining the motion, was erroneous.	"This was a suit before a justice of the peace, brought by the plaintiff in error as administrator, to recover a sum not exceeding $100. In the County Court, on appeal, the defendant moved to dismiss on the ground that the justice had no jurisdiction, as the plaintiff sued as administrator, and the amount claimed exceeded $20. The court sustained the motion, and on such ruling the case comes up by writ of error.
"Mr. A. E. Harding and Mr. L. E. Payson for the plaintiff in error.	"A. E. Harding & L. E. Payson, for plaintiff in error.
"Mr. J. M. Barret for the defendant in error.	"J. M. Barret, for defendant in error.
"Mr. Justice Lawrence delivered the opinion of the court."	"Mr. Justice Lawrence delivered the opinion of the court."

The following is an example of all the cases, as showing the courts from which the appeal is prosecuted:

MYERS' BOOK GIVES: Vol. 38, page 438.	CALLAGHAN & CO.'s. Vol. 38, page 438.
"Appeal from the Circuit Court of Cook County; the Hon. Erastus S. Williams, Judge, presiding."	"Appeal from the Circuit Court of Cook County; Hon. Erastus S. Williams, J."

If appellants could have obtained this information from other sources than the books of appellee, it was not done. This class of matter, however, is wholly original with and was furnished by Freeman, and its appropriation by appellants' copying the same into their books is a deliberate piracy and a clear infringement of appellee's copyright. As an example of the assumed abridgment, asserted by counsel, I submit the following example, appearing in Myers' volume, and as copied in Callaghan's book:

MYERS'.
Vol. 38, p. 436.

"The case is stated in the opinion of the court.

"Messrs. Tipton and Benjamin, for the plaintiff in error, insisted that an indictment for selling liquor without a license should allege to whom the liquor was sold, or that the name of the purchaser was unknown, citing: *Com. v. Thurlow*, 24 Pick., 374; *State v. Walker*, 3 Harrington, 547; *State v. Steedman*, 8 Rich. (S. C.), 312; *State v. Jackson*, 4 Black., 49; *Blodget v. State*, 3 Ind., 403; *State v. Burgess* 4 Ind., 606; *State v. Stuckey*, 2 Black., 289; *Neales v. State*, 10 Mo., 498; *Capritz v. State*, 1 Md., 569; *State v. Faucett*, 4 Dro. & Batt., 107; *State v. Wentworth*, 35 N. H., 442; *State v. Hitchings*, 5 Gray, 482."

CALLAGHAN & Co.'s.
Vol. 38, 436.

"The case is stated in the opinion of the court.

"Tipton and Benjamin, for appellant, cited, to the point that the indictment should allege to whom the liquor was sold, the following cases: *Com. v. Thurlow*, 24 Pick, 374; *State v. Walker*, 3 Harrington, 547; *State v. Steedman*, 8 Rich. (S. C.), 312; *State v. Jackson*, 4 Black, 49; *Blodget v. States* 3 Ind., 403; *State v. Burgess*, 4 Ind., 606; *State v. Stuckey*, 2 Black., 289; *Neales v. State*, 10 Mo., 498; *Capritz v. State*, 1 Md., 569; *State v. Faucett*, 4 Dro. & Batt., 107; *State v. Wentworth*, 35 N. H., 442; *State v. Hitchings*, 5 Gray, 482."

The only abridgment here is the omission of a few words.

Vol. 38, p. 438.

"Mr. Charles C. Bonney and Mr. J. Edward Fay, for the appellant.

"This is the instrument sued upon, and in the name of an assignee:

'$200. CHICAGO, ILL., Sept. 19, 1859.

'For value received, I promise to pay to the order of Shubael D. Childs, two hundred dollars, with interest, payable to F. Vose, or bearer, the first day of July, next, at Messrs. Forrest Brothers & Co. banking house, Chicago City, Illinois.

Vol 38, p. 438.

"Charles C. Bonney and J. Edward Fay, for appellant, cited: Ill. R. S., title 'Negotiable Instrument,' §§ 3, 4; *Mayo v. Chenowith*, Breese, 155; *Clifford v. Keating*, 3 Scam., 250; *Mussellman et al., v. Oakes*, 19 Ill., 91."

SHUBAEL D. CHILDS, JR.'

"It is not a promissory note, and is not negotiable as such. Statute of Negotiable Instruments, Sec. 3; 4; *Mayo v. Chenowith*, Breese, 155; *Clifford v. Keating*, 3 Scam., 250; *Musselman et al. v. Oakes*, 19 Ill., 91."

"Mr. E. W. Evans, for the appellee, insisted the instrument was good as a promissory note, and negotiable, citing: Chitty on Bills, 153 to 160; *Willis v. Green*, 10 Wend., 519; *Congregational Society v. Goddan*, 7 N. H., 430; *M'Guhn v. Childress*, 2 Steward, 506; *Chittenden v. Ensign*, Wright, 721."

"E. W. Evans, for appellee, cited: Chitty on bills, 153 to 160; *Willis v. Green*, 10 Wend., 519; *Congregational Society v. Goddan*, 7 N. H., 430; *McGuhn v. Childress*, 2 Steward, 506; *Chittenden v. Ensign*, Wright, 721."

The additional table attached to this argument containing a few examples from each of volumes 39 to 46 inclusive, has been prepared to save the court labor. It is conclusive of the piracy charged in the supplemental bill.

I now call further special attention to the evidence of Mr. Denslow, as to the manner in which he claims to have re-edited and prepared for the press volumes 39 to 46 inclusive; also to the evidence of other witnesses and experts touching the question of these volumes as reprinted by appellants, constituting a piracy upon appellee's copyrighted works.

Mr. Denslow testified, page 433:

"There were some instances in which some printed matter was used, no instance in which it was sent as printed.

"Q. From whence was that printed matter taken?

"A. As I stated on a previous examination, where there appeared contracts, documents, and in some instances long statutes or ordinances, and possibly in one or two instances pleadings covering several pages, I did, to save copying, compare the copy published by Freeman with the copy on file, and, after correcting that, included it in my manuscript as the document itself was published, probably, *and the mode in which I obtained a copy of it is immaterial.*

"Q. *Is it not true that in making up each of the books for Callaghan & Co. a copy of Freeman's book was cut up and used in the preparation?* (Page 434). * * *

"A. IT WAS CUT UP AND PORTIONS OF IT WERE USED.

"Q. In preparing these volumes, didn't you have Freeman's copy of the same volume before you all the time? (Page 435.)

"A. Not all the time, by any means. When I was obtaining copies of the opinions or when any document as I have spoken of arose. I would need Freeman's volume; when I was examining the records of these cases I would not.

"Q. Now, do you swear that you did not copy any of the arguments of counsel and the citations of authorities from Freeman's book?

"A. I do not think I did."

This editor would not swear positively that he did not copy arguments and citations from Freeman's book. Even if only a striking resemblance, and not actual copying, were shown by the evidence between appellants' and appellee's books, a presumption of infringement would arise, and the *onus* would be upon appellants to show they had not infringed appellee's books by either copying therefrom the old matter, or using the new matter therein, literally or in substance.

Drone states the rule at page 400:

"*Substantial identity or a* STRIKING RESEMBLANCE, between the work complained of and that for which protection is claimed, *creates a presumption of unlawful copying, which must be overcome by defendant.* Lord Ellenborough, said in *Elworth* v. *Wilcox*, 1 Campbell, it was remarkable however, that he (defendant) has given no evidence to explain the similitude, or to repel the presumption which that necessarily causes."

This witness (Denslow) further testified, page 435:

"Q. Can you swear you did not use Freeman's book?

"A. Whatever I say, I swear. * * If any use was made of Freeman's book, it was a mechanical use to save copying what I found spread out in the files and records in a form which entitled me to copy it. * * The matter that was taken from Freeman's book, as I said before, consisted of documents, pleadings, contracts, etc., that were not Freeman's, but the records, and for the purpose of making copies of those I might use the published copies in Freeman."

At page 439, this witness testifies that the copies prepared by him for the printer were not preserved; they were returned to him with the proof, and were treated by him as waste paper; *that is, destroyed.*

He was repeatedly pressed on cross-examination to point out in the course of his evidence the original matter furnished by him, and to distinguish the same from like matter in the copyrighted edition. He stated that he had not preserved the manuscripts, and he utterly failed to answer the questions upon this point, except by the most persistent and continued evasions. He testified that he was especially careful in the preparation of the later volumes, after the bill in this suit was filed, to avoid the use of the original matter in Freeman's books. He knew the issue involved in this controversy after the bill was filed. He was not only a lawyer, but a teacher of the law, by profession. He knew how important such a manuscript prepared by him would be as proof in favor of his employes, the defendants, and yet he not only failed to preserve the manuscripts, but testifies with child-like frankness that he had destroyed them.

Drone, in briefly stating the rule held in the English courts, page 515, says:

"Lord Eldon thought that it was the duty of the defendant, when piratical and original matter were combined

in his work, to point out the parts which had been copied. In a very doubtful case of piracy, the defendant could escape an adverse judgment of the court by producing his manuscript. In *Gerrold* v. *Houlston*, the fact that copying was denied, falsely in the belief of the court, was an important circumstance in leading the vice-chancellor to grant the injunction."

Mr. Denslow further testifies, that he commenced the volumes 39 to 46, inclusive, in February, 1878, and that he finished re-editing and prepared the last of these volumes for the printer in June, 1879, in all about sixteen months. (See his evidence, pp. 417–18–21.) This evidence is contradicted by A. P. Callaghan, one of the appellants, who testifies, page 447, that volumes 41 and 44 were published, that is, put upon the market, April 26, 1879. As appears from the evidence, it would require at least two months to print each of these volumes; they must have been fully prepared for the press as early as February, 1879, at which time Mr. Denslow must have completed his labors, thus showing conclusively that instead of working upon these volumes sixteen months, his labors could not have possibly covered a period to exceed twelve months.

Mr. Denslow testified that he prepared new syllabi, new head-notes, new statements of fact, new tables of cases, new index to the opinions, new statements of citations of authorities from the briefs of counsel, carefully read and compared each original opinion on file in the clerk's office and the record thereof, read and corrected all the proof of volumes 39 to 46, both inclusive, making eight volumes in all, within a period of sixteen months, and during the same time made careful and elaborate notes at the foot of each opinion, annotating all the decisions of the three grand divisions of the Supreme court upon the questions arising in each opinion, but one of his co-defendants

expressly contradicts him, by showing the time the last two volumes were out of the press and upon the market, he must have done this work within twelve months. Without strong corroborative testimony, this statement of the witness cannot be believed by any person in the least familiar with the great labor, care and detail of such a task.

Counsel in his argument upon this point (brief 96, *et seq.*) enters into a careful analysis of this unparalleled literary performance of Mr. Denslow, and clearly shows that if it could be done at all it required the full sixteen months within which to accomplish it, while the evidence of A. P. Callaghan discounts the time one-fourth. Thus clearly proving, that Mr. Denslow could not have performed one-fourth of the work within three-fourths the time, except by copying from and using Freeman's books to save labor and expedite the *entire* work.

But counsel contends that the work done by Messrs. Ewell, North and Judge Bailey, on any of the volumes from 39 to 46, inclusive, was not used by Mr. Denslow in re-editing these volumes, and was so rejected by him after this bill was filed, for the sole purpose of avoiding any charge of infringement as to the matter contained in Freeman's book, or copying from the same.

Mr. Denslow assigns a different reason for rejecting the work done by these distinguished gentlemen, if *the same was rejected*, as contended by counsel, and upon this point testifies (page 418):

"Q. I am asking you for your reason for laying aside matter which had been prepared, and going to the records for information over again. What was your motive—your reason for doing it?

"A. *Well, it was to earn my salary.*"

Therefore this witness did not intend or attempt to avoid an infringement. *His only purpose was to multiply the work and earn the most money with the least labor.*

We submit the following testimony in addition to a few illustrations from each of appellants' volumes compared with appellee's, from 39 to 46, inclusive, to show that admitted errors in appellee's appear in appellants' volumes, which fact is recognized by all the courts, both English and American, as the strongest proof of piracy.

F. W. S. Brawley, practicing lawyer for over thirty years, testified, as to paging, striking similarity and identical mistakes, etc. (page 383):

"In the 42d published by Myers, same published by Callaghan; sometimes there will be a slight difference; not always, but almost every case; the case is reported as beginning on the same page in the two books all the way through. The paging in the Callaghan edition seems to be arranged so as to correspond with the paging in the Myers; for instance, the cases begin on page 9 in Myers and they begin on page 9 in Callaghan, and then 9 is repeated; and the next case begins on page 18 in both, and then page 20 is repeated six times in Callaghan edition, so that it brings them both out at page 34. The next case begins on 35 and 35 is repeated three times in Callaghan, so that the following case begins on the same page, 39. Then the next begins on page 41 and ends on page 45. The next one begins on the same page and then 45 is repeated in the Callaghan edition so as, apparently—let them terminate and begin the next case on the same pages. Page 53 is repeated in the Callaghan edition, and when we get to page 59 we jump to page 64; from 59 to 64 is omitted. On page 71 Mr. Justice Lawrence delivered the opinion of the court, and they are both identical; and then from 74 we jump to 76, so that the case in each volume ending on page 78 and the next case begins, in the Callaghan it ought to be 79, but in the Myers edition the next case begins on 78—that is, 78 is repeated in the Callaghan edition—and

then it jumps to 80, then it jumps from 87 to 89, and then 89 is repeated three times, and then 96 to 98, and then 100 is repeated; 108 is repeated three times, on 114 there is a note at the bottom of the page repeated or copied; 120 is repeated twice; then 144; then 123 jumps to 129; 144 is repeated three times, and then it jumps to 149 to 151; 154 is repeated three times. I notice a similarity in the syllabus, on page 159 the same number of paragraphs. From 192 it jumps to 198, and 192 is repeated, a note on 19, top paging of the Callaghan edition, being a note in the same case, *Scammon* v. *The City of Chicago*, in Myers' edition, page 193. Beginning on page 198 is the case of *De Wolf* v. *Pratt*, decided in '66. At the April term 1867, was a petition for rehearing filed, and there is a similar note of the decision of the case on rehearing disposed of on page 212. The case was decided in '67 and a rehearing inserted on page 212.

"Q. You mean that it appears in both volumes?

"A. Yes, it appears in both volumes in a similar note; a petition was filed at the April term of 1867, and it came in on the same page under a similar note as to the rehearing.

"Q. You mean there is a similar note in the Callaghan company book as there is in the Myers book?

"A. Yes, introducing the opinion; the rehearing was decided in 1867, and there is a similar sort of note—almost identical note.

"Q. It appears that the case was decided in 1866?

"A. Yes, sir; on page 230 there is a case that was decided in 1866; in the statement of counsel there is a curious coincidence in the statement of an authority by Mr. Chase. Among other authorities he cites *Nicholas* v. *McEwen*, in the 17 N. Y., 22; the same statement from Chase in both are similar—the same authorities—that is, among others, they both cite the same authority in both books. Myers says, '*among numerous authorities*,' he cites *Nicholas* v. *McEwen*, and the other states, '*among other authorities*,' he cites *Nicholas* v. *McEwen*. That is a little peculiar, that he cites that case out of *numerous cases*. On page 30, at the seventh line from the bottom, there is an error which is repeated at the same place in

the Callaghan edition, 'negotiable papers' should be 'negotiable paper.' In the seventh line from the bottom of page 30, in the Callaghan edition, it says, 'This should be negotiable paper,' and it shows that the opinion was copied, *and the same error was repeated in the Callaghan edition*; and on page 213, in the eleventh line from the bottom, there is another error; 'or,' should be 'for'; 'or if the question had been,' should be 'for if the question had been.' *It is an error in Freeman, and has been repeated in Callaghan.* Then page 479 is repeated, and then jumps from 476 to 485. In the Callaghan book 490 is repeated, and 491 is repeated three times, and 495 is repeated three times—that is, the top page is repeated.

"Now, in volume 43, on page 3, there is a similar notice of the appointment of Mr. Ingersoll. On page 4, Mr. Freeman reports the practice act passed in 1869; and the Callaghan book, published in 1878, publishes the same practice act with the same heading which then appeared in the general statutes. In those two volumes the two tables of cases are most identical right through. In the Myers edition, the case, *Cleghorn* v. *Postlewaite*, the table of cases has *Postlewaite* spelled *Postlewaite* just as it is in the report of the case in the volume, and in the Callaghan edition in the body of the book *Postlewaite* is spelled *Postelwaite*, but at the table of cases it is spelled the *same* as in the Myers table of cases. In the case of *Goodridge* v. *John Van Nortwick*, in that case reported on page 445 in the Freeman book, there is a mistake in the table of cases. It is called there Nortwich instead of Nortwick, and that is repeated in the table of cases in the Callaghan book.

"Q. It is wrong in both tables of cases?

"A. It was wrong in both tables of cases, and in the case of *Walters* v. *Wetherell*, at page 288, it is *Walters* v. *Wetherell*; in the Myers edition it is *Walters* v. '*Witherell*,' and in the table of cases it is '*Witherell*;' just the same in both books. It is '*Witherell*' in the table of cases in both, and in the report in the Callaghan edition it is '*Wetherell*.'

"Now, page 97, the case of *Hume* v. *Gossette*, it is *Gossett* in the table of cases, and in Myers they make a mistake and call it '*Gossitt*' and that is repeated in Callaghan; the same error in the body of both books.

"Now, *Willetts* v. *Paine*, page 432, it is '*Willets*' in the Callaghan edition, but in the table of cases it is spelled as it is in the Myers' edition '*Willetts*.' In the Freeman edition, Freeman publishes an extra opinion which was published in 1869. He published the case of the *Chamber of Commerce* v. *Sollitt*, which was decided in 1866, and Callaghan does the same on page 519 or '20. It looks as if the case as published by Freeman was omitted at the time; it should have been put in, and he puts it in in 1869, and it does not come in the place that it should come, and he states that it was omitted. *Callaghan gives the same case.* It begins at page 519 in each one, and each one gives the omitted case.

"In the opinion of the court on page 35 in Myers' edition the case of *Lawrence* v. *Smidt* is referred to in the 35th of Illinois, page 440. It is repeated in the Callaghan as *Smidt*, just as it is in the Myers book. *It is evidently a mistake in the Freeman book, and was repeated on the same page in the Callaghan book as Smidt*, and I turned to the 35th Illinois and found that it is spelled there '*Schmidt*.' This is as far as I had time to compare."

George W. Cothran testified, page 389:

"Q. In the comparison of the volumes published by the defendants with those of the complainant, state whether it would be possible for a person to make the book so nearly alike as the book of the complainant, without the using of the book of the complainant.

"A. Unless the person possess the abnormal memory of a certain clergyman in this city, I should think it would be very difficult. It would be very difficult to print two books so similar without the person preparing the second having the other one present."

E. B. Myers, testified, page 392:

"Q. Upon examination can you state whether any portion of the books as published by you have been copied by the defendants?

"A. I have examined them. * * In the table of cases I notice several errors in the names of parties that are copied in the defendants' edition. I mean errors made in my book. The whole arrangement is similar to mine. In

the catch line of the syllabus in many instances there is a marked similarity. Many of the statements of cases are very similar and in the others words are omitted, colorable changes to convey similar facts. The paging throughout all the volumes is made to conform to mine, particularly in the commencement of each case."

It is unnecessary to pursue this class of evidence or illustrations. They might be multiplied through every volume of Myers' books by comparing them with the pirated books of Callaghan.

Appellee's Books were largely used to save labor.

The principal service performed by Messrs. Ewell and Denslow was in their faint attempt to mask their piracy by changing words and phrases from one part of a sentence to another, or by exchanging one word for another of like meaning.

It is contended however, by counsel, that appellants' book was "built" by Ewell and Denslow, as an abridgment of Freeman's edition. It does not purport, upon its face or by its title, to be an abridgment. They even pirated the title of Freeman's book, and so advertised it. (See Exhibit, Callaghan's Published Catalogue, Trans., 446.)

If they had truthfully "re-reported" why did they not advertise them as Ewell or "Denslow's Reports," and not "Freeman's Reports," as published by Myers. But a year after the supplemental bill was filed they pasted a slip covering that line in their *catalogue* as directed by their counsel (See p. 448), but they could not recall the circulars distributed during the years 1877 to 1882.

The thought of an abridgment was inspired by the desire to escape the consequences of this open, uncovered piracy.

Drone, 159, says: "So anyone may acquire copyright for an abridgment or translation of a copyrighted work, provided he has the consent of the owner so to use it. But it is maintained elsewhere, that to make such use of a copyrighted work, without due authority, is piracy."

Page 158: "But to reduce the size of a work by copying some of its parts, and omitting others, creates no title to authorship, and the result will not be an abridgment entitled to protection, within the meaning of the law."

Page 434: "The question of piracy, then, in the case of an abridgment, translation, or dramatization of a work protected by copyright is to be determined by two inquiries: 1. Whether the whole, as a material part of the original, has been substantially reproduced; 2. Whether the original has been used with the consent of the owner."

Under the rules here stated, and the definition of abridgment given by this author, it is manifest, first, that appellants' had no right to abridge the copyrighted volumes of appellee without his consent; second, that the new books do not purport and were never intended to be abridgments of Freeman's reports; third, appellants in their answers did not rely upon their works being abridgments of appellee's copyrighted works.

In *Folsom* v. *Marsh*, 2 Story, 106, held: "So, it has been decided that a fair and bona fide abridgment of an original work is not a piracy of the copyright of the author. But, then, what constitutes a fair and bona fide abridgment in the sense of the law, is one of the most difficult points under particular circumstances, which can well arise for judicial discussion. It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials and intellectual labor and judgment bestowed thereon; and not merely the facile

use of the scissors; or extracts of the essential parts, constituting the chief value of the original work."

Neither Mr. Ewell or Professor Denslow pretend, and no witness testifies, that the books of appellants, as edited and published by these two gentlemen were in any sense abridgments of appellee's volumes. The evidence shows, and the comparative tables here submitted, and paragraphs exhibited in this argument in double columns, that they may be compared and examined with little trouble and labor, clearly prove that while some matter was omitted, that is, some cases not cited in briefs of counsel, some lines omitted from the syllabus, that all the matter retained in the new book stands without condensation, and is not an abridgment in any sense.

In *Story's Exrs.* v. *Holcomb*, *supra*, the defendant pleaded that the new work was an abridgement; held (p. 311):

"Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages. It must be in good faith an abridgment and not a treatise, interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed." Injunction granted.

Denslow testifies, and counsel insists in one part of his argument that much was taken from the clerk's office to escape the charge of infringement, which conclusively disproves the purpose to abridge.

In *Greene* v. *Bishop*, 1 Clifford, 291, held:

"It is clear that the mere copying of a portion of the materials without any essential condensation of the same,

cannot be held to bring the work within the legal description of an abridgment."

Giles v. *Wilcox*, 2 Atk., 143.

Can law reports be abridged? that is, can an abridged opinion of a court be called an opinion, and can a volume of such abridged opinions be rightfully considered a report of the cases decided by the court? Taking the peculiar elements that enter into a well arranged, intelligently and scientifically prepared report, and how can it be condensed?

After opinions of the court rendered in the decision of causes have been condensed, whose opinions will they be, the authors or the courts? Undoubtedly, many more opinions could be incorporated in an average sized volume by omitting therefrom briefs of counsel, instructions, assignments of error, and statements of fact from the record, leaving the volume to contain only the opinions of the court as written by them, and handed down to the clerk. This would not constitute an abridgment in any sense. Portions may be omitted, and volumes shortened, but under the cases cited and the rules stated, the result would not be an abridgment of the original work.

It is sufficient to say that Callaghan's books were not prepared, and are not labeled or designated abridgments in any manner. The purpose or intention to abridge neither appears in the answers of defendants or in the evidence in the case, in the books themselves or by their title.

Mr. Justice McLean, who fully examined the question of copyright, announced the majority opinion of the court in *Wheaton* v. *Peters*, *supra*, citing in the case of *Story's Exrs.* v. *Holcomb.* Held:

"*If this book were intended* TO BE A MERE ABRIDGMENT *of the commentaries, the fact is not indicated in the title.* WITHIN MY KNOWLEDGE, *no* ABRIDGMENT HAS BEEN MADE OF ANY BOOK WHICH HAS NOT BEEN SO ENTITLED."

I will not attempt a review of the authorities cited by counsel upon the question of abridgments. I have no doubt that the cases are well selected, faithfully analyzed and fairly commented upon by the learned counsel, but in my view, under the authorities cited, and from the pleadings and evidence in this case, there is no abridged work before the court in the consideration of which the cases cited by counsel can apply. The point was not made in the court below; nevertheless, if Callaghan's books had been, and were, in fact, abridgments, his Honor, Judge Drummond, would not have disposed of the case upon the grounds stated in his opinion.

VI.

COUNSEL COMPLAINS THAT "APPELLANTS WERE COMPELLED TO MAKE DISCOVERY IN AID OF FORFEITURE SOUGHT BY APPELLEE."

I reply that no forfeiture was decreed, and therefore no injury resulted to appellants by reason of the order, and an error without injury will not reverse.

The order complained of was entered March 3, 1884, and contained the judgment of the court so far as it had proceeded upon the merits of the case, said judgment being recited in the order adjudging an infringement, and that complainant was entitled to recover the profits, etc.

The case is then referred to the master, with directions to hear evidence and to report an account of profits,

which defendants have received or which have accrued to them, etc. The order then provides:

"It is further ordered that said defendants may be examined in relation thereto, and that they may be required to produce before said master their books of account and papers relating to the publication and sale of the said volumes last named."

Notwithstanding this order to produce the books before the master, appellants refused so to do, and they were not produced before the master or the court under this order.

In counsel's printed argument before the court below upon exceptions to the master's report, he seriously arraigned Mr. Bennett for having reported that appellants refused to produce the book, pursuant to this order, and upon this point counsel said:

"When the order of reference to Mr. Bennett was entered Judge Drummond directed explicitly that Mr. Myers should, under no circumstances, have personal access to any of our books of account, but that the examination in his behalf should be conducted by an expert to be employed by him for that purpose. *The propriety of this direction was acquiesced in by counsel for both parties.*"

That later: "The matter was then laid before Judge Drummond, who ruled that complainant was entitled to have the examination proceed at the master's office if he so desired. In this ruling defendants' acquiesced, and the books were then brought to the master's office from time to time as required by complainant's experts."

It thus clearly appears that the books were not produced before the master under the order to which counsel now objects, but under direction of Judge Drummond later given by the consent of counsel, and in which he fully acquiesced.

But irrespective of such consent, acquiescence and approval by counsel of the manner in which the books

were actually examined, as far as examined, the entry of the order now complained of is fully sustained by the rules of practice in chancery.

The judgment of the court by the order limits the recovery of plaintiff to "the profits which they (defendants) have received or made, and which have accrued to them," etc.

Drone says, page 531: "Besides granting an injunction, a court of equity will take from the defendant the profits he has made by the publication or sale of the piratical work and give them to the plaintiff."

The court can order an account of profits to be taken under the general prayer for relief.

Appellee secured his copyright under the law of 1831, paragraph 10, section 4, of which provides, among other things, that the infringer "shall forfeit every copy of such book to the person legally at the time entitled to the copyright thereof," etc.

This provision of forfeiture is re-enacted by Congress in the copyright law of 1870. The construction of this provision and as to whether the forfeitures therein provided can be enforced in a proceeding in equity to restrain infringement for an accounting, etc., were involved and determined by this court in *Stevens* v. *Gladding et al.*, 17 How., 453. Held:

"The next question is, whether the complainant can have a decree in accordance with the prayer of his bill for the penalties imposed by the seventh section of the act of February 3, 1831. The bill prays specifically for a decree for these penalties. We speak of the forfeiture of the printed copies, as well as of the sum of one dollar for each sheet unlawfully printed, as penalties; for, under the laws of the United States, it is clear that the complainant can have no title to either of them, except by way of penalty. There being no common law of copyright in

this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof, in some act of Congress, either *nominatim* or by a satisfactory implication; and, looking to the act of Congress applicable to this subject-matter, it appears that the rights claimed by this bill are expressly conferred by way of forfeiture."

The court then refers to paragraph 10, section 7, act of 1831, above cited, and say:

"In the case of *Colburn* v. *Simms*, 2 Hare, 554, Mr. Vice-Chancellor Wigram came to the conclusion, that since the decision of the house of lords in the case of *Miller* v. *Taylor*, the right to a decree for the delivery up of copies must be rested by the complainant upon some statute provision; and that inasmuch as courts of equity do not enforce forfeitures by an exercise of their ordinary jurisdiction, such a jurisdiction also must be derived from an act of parliament. And though the eighth section of the act of 1 & 2 Vict., c. 59, as well as the preceding act of 54 Geo. III, c. 156, Sec. 4, allows the forfeited copies to be recovered in 'any court of record in which an action at law, or a suit in equity, shall be commenced by such author or authors, or other proprietor or proprietors,' etc.; yet it was admitted, in *Colburn* v. *Simms*, that no such order had ever been made *in invitum* in a court of equity. It is a significant fact that congress, in legislating on this subject, though manifestly acquainted with the phraseology of the act of George III, and though in some particulars it adopted that phraseology, yet omitted to confer upon courts of equity power to enforce either of the forfeitures provided for, but left them to be recovered 'in any court having competent jurisdiction thereof.' And the only equitable jurisdiction, as to copyright, conferred upon the courts of the United States, is by the act of February 15, 1819, which gives original cognizance to the courts of the United States, as well in equity as at law, of cases arising under any law of the United States, granting to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and upon any bill in equity filed by any party aggrieved

in any such case, shall have authority to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors secured to them by any laws of the United States, on such terms as the said courts may deem fit and reasonable. Though the substance of this enactment is incorporated into the 17th section of the patent act of July 4, 1836, so far as it related to inventors, and so far as it related to the subject of patent rights, is no longer in force, *proprio vigore*, yet, so far as it gave cognizance to the courts of the United States of cases of copyright, it still remains in force, and is the only law conferring equitable jurisdiction on those courts in such cases; for the 9th section of the act of February 3, 1831, protects manuscripts only.

"There is nothing in this act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended, that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must therefore be rejected.

"The remaining question is, whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for general relief.

"The right to an account of profits is incident to the right to an injunction in copy and patent-right cases. *Colburn* v. *Simms*, 2 Hare, 554; 3 Dan. Ch. Pr., 1797. And this court has held in *Watts et al.* v. *Waddle et al.*, 6 Pet., 389, that where the bill states a case proper for an account, one may be ordered under the prayer for general relief. See also 2 Pet., 612; 14 *Ib.*, 156; 16 *Ib.*, 195; 9 How., 405."

In *Colburn* v. *Simms*, 2 Hare, 543, cited and approved by this court in *Stevens* v. *Gladden*, *supra*, a bill was filed in the equity court charging an infringement, with a prayer for forfeiture and an accounting as in the case at bar. The vice-chancellor considered, first, the jurisdiction

of the equity court over the question of forfeiture; second, the right of plaintiff to an accounting; and held that the equity court had no jurisdiction over the question of forfeiture but that the plaintiff was entitled to a full answer from the defendant upon the question of the accounting, which, under the practice then controlling in equity, required the defendant to make full discovery of sales, etc.

In the disposition of this question, it was held, page 554:

"Now, independently of certain expressions in the statutes which directly point to the jurisdiction of this court, and supposing this court not to be a court of record within the meaning of the statutes, the question suggests itself, whether a court of equity will afford any assistance in giving to a forfeiture, or whether the parties ought not, so far as respects this claim, be left to their remedies at law. The general rule undoubtedly is, that where a party seeking equitable relief is incidentally entitled (in the same case and in the same court) to the benefit of a penalty or forfeiture, the court requires him, as a condition of its assistance, to waive the penalty or forfeiture."

It was not held, as contended by counsel, that where the party had two distinct remedies, one cognizable in equity, and the other exclusively at law, he must waive the latter before he could obtain the former.

The vice chancellor further held that the special remedy by forfeiture given by the statute did not affect, limit or embarrass the "ordinary jurisdiction" of a court in equity to order an accounting, and compel discovery in the same manner as though the special remedy of forfeiture had not been created.

"I cannot, therefore, admit the argument for the defendants, that because the statute has given certain specific remedies, therefore, a party is precluded from any other

remedy which is proper for the protection of the right which the statute gives him, and which he might have had when the act passed."

Notwithstanding the prayer for forfeiture, the chancellor held, "and with respect to the accounting prayed, I think he (complainant) had a right to call for an answer."

Section 4,964 of the present law of Congress regulating and controlling copyrights, enacted in 1870, and as thereafter amended, does not enlarge the jurisdiction of courts of equity in this particular. The last clause of this paragraph provides that these forfeitures may be enforced "in any court of competent jurisdiction."

In *Stevens* v. *Gladden*, *supra*, this court held that this phrase did not enlarge equitable jurisdiction. This case and *Colburn* v. *Simms*, *supra*, are conclusive upon this point.

A want of jurisdiction over a part of a subject-matter, or as to a part of the relief prayed, will not prevent or in anywise obstruct the court from inquiring into and deciding matters within its jurisdiction.

Can it be that a court in equity cannot order an accounting and compel a production of the evidence in the possession and under the control of the defendant, to show the amount of sales and the profits to which the complainant is entitled under the law, unless the complainant agrees that he will not go into another court and litigate there, a right plainly and unequivocally conferred by the law of Congress, to take an account and perpetually enjoin a continuing infringement?

Drone says (page 533): "But where the court has been in doubt as to the plaintiff's right and has refused to grant an injunction until the establishment of that

right, the defendant has been ordered to keep an account in the meantime. On the same principle, where a temporary injunction is refused in consequence of doubt, an account may be ordered to be kept until the final hearing, when it will be decided whether or not the profits shall be paid the plaintiff."

If the court has no power to order books of account kept by the defendant to be brought before the master on an accounting without waiver on the part of the complainant, then it would have no power to order an account of sales kept, in a doubtful case, until final hearing.

Counsel cites with confident assurance, *Atwell* v. *Ferrett*, 2 Blatchf., 39. This case was heard and decided in 1846. The case of *Stevens* v. *Gladden*, *supra*, was heard and decided at the December term, 1854, of this court; therefore, when the district judge decided *Atwell* v. *Ferrett*, he did not have the decision of this court in *Stevens* v. *Gladden* before him, or he would not have held as he did (in *Atwell* v. *Ferrett*, page 45), "*so probably on* "*such discovery, equity might compel the defendants to de-* "*liver up to the plaintiffs the forfeited copies*," which (*Stevens* v. *Gladden*) *this court decided a court in equity had no power to do under the law of 1831.*

Drone, 487: "Two distinct remedies are given by the statute to the owner for the invasion of his property. He may sue for the damages which he has sustained, and for the recovery of the printed copies. He is not restricted to either one of these, but may avail himself of both at the same time."

If the equity court could not order a defendant to pay the profits upon his sales to complainant without decreeing a forfeiture, it might be contended with some force that complainant might be required to waive forfeiture before the court would proceed as a condition of its assist-

ance, but where forfeiture is not incidental to the accounting, where the decree ordering the profits paid would not in any sense constitute evidence that could be used in a proceeding in another court, to have such forfeiture declared no such waiver in reason, in practice or in justice could be required.

VII.

Damages not Excessive.

The errors, if any, of the masters in computing the damages and the court in confirming the reports, *were* in allowing less damages to appellee as profits realized by appellants, than the rule under the evidence in this case would warrant.

The cause upon the original bill was referred to Henry W. Bishop, one of the masters, to take an account of the sales of volumes 32 to 38, inclusive. Upon the supplemental bill the cause was referred for a like purpose to John I. Bennett, master, to take an account of the sales of volumes 39 to 46, inclusive, both to report their conclusions and state the amount to be paid by appellants to appellee as profits from the sales of the pirated copies 32 to 46, inclusive.

Mr. Bishop made and returned to the court a carefully prepared report (transcript 64), in which he found that the reprints by appellants of volumes 32 to 38 aggregated 4,313 copies, of which 2,909 copies were sold for the aggregate sum of $13,451.19, average price per volume $4.62½. In determining the profits Mr. Bishop refused to consider the cost of stereotyping, editorial work, proof reading, or the amounts drawn by appellants, the members

of the firm. He allowed, however, twelve and seven-eights per cent. of the general expenses and cost of reprinting and binding the pirated volumes to be charged against the gross sales, making the total charge $6,465.14, which, deducted from the $13,451.19 total sales, left $6,986.05 as profits due appellee.

The report of Mr. Bennett (transcript 70) found total volumes 39 to 46 inclusive, reprinted to be 3,854, counting four copies of volume 40, total number sold, 2,292, gross receipts, $10,231.48, average selling price, $4.46. He allowed no deductions from sales for stereotyping, editorial work or money drawn by the partners from the concern, but added twelve per cent. of the general expense account to the cost of composition, paper and press-work and binding. In fact he allowed (transcript, 75) the total cost of known expenses of production of all the volumes sold exclusive of stereotyping. Deducting the cost of production from total receipts on sales, he found due appellee from appellants, $4,433.44.

Mr. Bennett found (transcript, 77) that under the partnership agreement between appellants from July 1, 1875, to July 1, 1879, that "each of said Callaghans shall be entitled to draw out of the business for his personal expense and support the sum of $250 monthly, and no more, and said Clark the sum of $208.33 monthly;" that under the articles in force from July 1, 1879, to 1882, each party thereto should be entitled to draw from the firm "for his own expense and support, to wit: A. P. Callaghan the sum of $4,000 per annum, and each of the other partners, $3,000 per annum, payable in monthly installments." Under the former contract the amount to be drawn was for "personal expense and support," and in the latter "to draw from the firm for his own expense and support."

The final result was a decree in favor of appellee for $11,760.19. (Transcript, 80.) While appellee contends that a higher price should have been fixed by the masters and allowed by the court as the market price, or the price at which the volumes sold should be charged to appellants, he has assigned no error thereon, and only calls the attention of the court briefly to the evidence hereafter, to show the error in this respect, if any, is against appellee and not against appellants.

The contention of counsel is essentially narrowed to the rule adopted by the master and approved by the court. *What is the rule?* The answer does not involve a question of fact.

Courts treat profits arising from the sales of a pirated book by the infringer as belonging to the owner of the copyright. The infringer is a wrongdoer, and equity will not permit him to receive the slightest benefit from a transaction which involves a palpable and deliberate violation of a law of Congress. The infringer cannot say to the owner of the copyright, "I will employ myself to reprint and republish an edition of your copyrighted work."

The evidence shows without dispute that appellee was conducting the business of buying, selling and publishing law books in the city of Chicago; that appellant was engaged in same business; that appellee had the copyright of volumes 32 to 46, inclusive; that the stereotype plates of 32 to 38 had been destroyed by the great fire. These were reproduced by appellee, some of them before appellants had completed the first volume of their reprint. Appellee had the stereotype plates to volumes 39 to 46, inclusive, before appellants began to reprint any of the volumes from 32 to 38, and as early as

February, 1877, the public, the trade and the legal profession were notified by published circulars issued by Mr. Freeman, the reporter, that Mr. Myers, as the owner of volumes 32 to 46, inclusive, would enter at once upon the republication of the same. Appellants themselves were expressly notified in November, 1876, by appellee that he would reprint these volumes as soon as he thought it would pay. If these copyrights were secured to appellee, if he was protected by the law of Congress in the ownership, control and use of these copyrights, he was not bound to reprint them at appellants' request, to enable him to continue their rightful owner, or to be entitled to the protection of the law against infringement and piracy. His failure, delay or absolute refusal to reprint during the life of the copyright, would not authorize appellants to reprint them at appellee's expense, great loss and injury.

If this edition reprinted by appellants was adjudged by a court of competent jurisdiction forfeited to appellee, would appellants be allowed the cost of producing the same? It is clear they would not. No such allowance would be made in a proceeding to have such forfeiture judicially declared. As a matter of justice, as a matter of strict right, are appellants entitled to the cost of production in an accounting, more than in a proceeding to forfeiture? It is only in a court of equity—a court of good conscience—that the infringer of a copyright is allowed the cost of production, and even in this court it should not be allowed to such an extent as to encourage piracy by offering a lucrative position to the pirate instead of punishing him for the offense.

The first item in counsel's list of grievances, is the cost for stereotyping, which the court refused to charge against the profits to appellee. Stereotype plates are not made

for sale; they do not pass with the copyright, and are *not* subject to forfeiture; they are no part of the edition; they add nothing to the volume of the book; they do not increase its sales.

In *Stevens* v. *Gladden*, *supra*, held: "Upon this question of the annexation of the copyright to the plate it is to be observed: first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing and being owned and transferred independent of the other. It was lawful for any one to make, own and sell this copper plate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright."

If the ruling contended for by counsel is approved by this court, where will it begin and end?

The owner of the copyright of a book stereotypes his first edition. The defendant reprints the book *verbatim*, and also stereotypes it. Shall complainant be compelled to buy and pay for the stereotype plates made by the infringer? If so, the owner of a copyright, protected by the law of Congress, is compelled against his will to duplicate his stereotype plates at his own expense and to his own injury, when he can have no possible use for the same. A second infringement occurs with a like result, and so on until the owner is bankrupted with duplicate stereotype plates.

Again, suppose the infringer copies part of the original, verbatim, changes a part, mutilates a part, omits a part, and inserts more or less new matter, all unsatifactory in every respect to the owner of the copyright, but the infringer prints and stereotypes this pirated edition, and, upon an accounting under counsel's rule, insists that

the profits shall be charged with the additional cost of the stereotype plates. Why should appellee be required to pay for what he never agreed to take—to pay for that, in the very production of which, a law was violated, to his hurt; but counsel innocently and in the apparent interest of appellee, urges that it is more economical to stereotype the first edition, and recites largely from the testimony of so-called experts to establish this economy, but this is not a question of economy. Appellee has stereotyped plates of the first edition, and if these stereotype plates were gratuitously presented to him, would it be a wise, prudent and sagacious business movement for appellee to use these stereotype plates to reprint what the court has adjudged infringements? In fact, counsel refers to the testimony of appellee to show that he for himself stereotyped all the volumes from 32 to 46, inclusive. Then why should he be compelled to purchase these from appellants? But appellants have not offered, either in evidence, in the pleadings, before the court below or before the master, where they insisted upon this allowance, to turn over these stereotype plates to appellee if their cost was allowed as a charge against these profits.

In *Stevens* v. *Gladding*, *supra*, held (page 453):

"So, if he has not acquired the right to print the map, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper and ink, or as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the limited time, during which the exclusive right exists, shall have expired, and then use it to print maps. He may sell it to another, who has the right to print and publish, but he can no more use that right of property than he can use a press, or paper, which belongs to a third person."

This wise suggestion of this court ought to relieve appellants from the necessity of compelling appellee to purchase these worthless stereotype plates and protect appellee from being forced to purchase against his own will.

Counsel say, page 126:

"The additional cost of this investment, with the interest thereon, will in time more than counterbalance the additional expense of stereotyping it, if that process is employed. Stereotyping is thus found to be a measure of economy, and this process is uniformly employed in the production of law reports, including not only original editions, but re-edited or new editions, such as the volumes in question."

This position of counsel presents the text of his argument upon this point.

It is the policy of the law and the right of the protected owner of a copyright that the pirated edition shall have no future. In the early history of copyrights, whether under the common law or acts of Parliament, where piracy was established, the defendant was ordered to destroy the books and all matter from which they might be reproduced, so as to prevent their use or reproduction. Under modern statutes, if the pirated edition is a *verbatim* copy of the copyrighted edition, the complainant may obtain the same by forfeiture, otherwise he can have the further publication, sale, or use thereof perpetually enjoined. Such is the decree in this case, and now in argument counsel ingeniously urges the court, by judicial action, to purchase the stereotype plates for appellee. Appellee insists that he has no need for them.

But the evidence of appellants dispute counsel's economical theory.

A. P. Callaghan testifies, page 586: That 100,000

copies could be printed without materially affecting the character of the work done, and before it could be discovered that the type was worn; that is, this could be done without stereotyping.

This evidence clearly establishes the fact that stereotyping these volumes was wholly unnecessary—a voluntary expense of appellants, which counsel in argument, without evidence, without precedent in a single reported case, insists shall be charged against the rightful profits due appellee.

Counsel complains that in an accounting, the master disallowed, in the computation for profits, the amount drawn by the partners, which under the partnership contracts, as shown in Mr. Bennett's report, was to be drawn from the firm capital for family and personal expenses. *The master also found that it appeared more to be a division of profits than a matter of salary, and no evidence was furnished by appellants upon this point.*

The policy of the law is to punish the infringer by taking from him all possible profits, or by forfeiture of the entire production. The infringer himself, whether of a patent or a copyright, was never allowed a salary for his actual time spent in the commission of the piratical act. Time so spent by the infringer is not treated as money—actual cash paid into the cost of and for the production. Suppose, instead of employing Messrs. Ewell and Denslow one of the appellants had done the work which they were paid for doing, could he bring forward an account for so much per month, or per annum, for preparing Freeman's edition for the printer, and have the same charged against the profits which the law declares belongs to the owner of the copyright? These infringing partners did not pay out for this work the sums they severally received. They

performed no part of the work; they contributed no actual labor in the production of the pirated edition. The evidence does not show that either of appellants wrote a word, corrected a line of proof, or performed any part of the manual labor performed by Messrs. Ewell and Denslow in the preparation of Freeman's book for the compositors. Callaghans only directed them to use Freeman's matter and furnish the books uncopied to the printers, and thus save the manual labor of copying, and the so-called editors furnished the literary masks.

MR. BENNETT RIGHTFULLY EXCLUDED COPIES NOT SOLD.

They did not contribute to the profits, and therefore these profits belonging to appellee should not be charged with their cost of production. It could with equal force be urged that if no sales had been made, and appellees were perpetually enjoined from selling the same, or any part thereof, that appellee should be decreed to pay the entire cost and save appellants harmless from loss.

If the infringer sells a copy and realizes profit thereon, the same belongs to the proprietor of the copyright.

If the infringer repurchases this copy, and again puts it upon the market at a profit, upon what principle does this profit belong to the infringer? At the first sale it left the hands of the infringer a pirated book. When it returned to him, and he again put it upon sale, by what process did its character become changed?

THE EVIDENCE CLEARLY SHOWS THE PRICE AT WHICH DEFENDANTS SOLD WAS HIGHER THAN THAT FOUND BY THE MASTERS.

Mr. Bishop in fixing the price of volumes 32 to 38, upon the sales made, in his report, and the court in the confirmation thereof, erred against appellee.

Mr. Bartlett testified (Trans., 531), he was in the employ of Culver, Page & Hoyne, selling their goods, including Illinois Reports, to outlying towns and counties; that his firm purchased, about February 19, 1878, at wholsale price, one copy of volume 38 at $7.50, with a twenty per cent. trade reduction, leaving the price at $6; that November 1, 1879, they purchased twenty-seven volumes, including a copy of volumes 32, 33 and 35, at an average wholesale price of $5 per volume. This lot included some of Freeman's volumes, then selling at $3.50, except volumes 73 and 74 and above 80, which were selling for $2.25 per volume. March 2, 1880, they purchased eight volumes, including a copy of volumes 32 and 35, at $7.50 per volume, with the usual trade discount. Receipted bills of these sales and prices Callaghan & Co. offered in evidence here.

Mr. Beckwith testified (Trans., 532), that he had been a law book-seller in Chicago for twelve years; that he purchased a volume of appellants for $6.75. He testified: "Their selling price was, as I understood, $7.50, ten per cent. discount to the trade. I understood this from Mr. Callaghan. They told me that was their price at various times when I was in the store, when I made inquiries during the last two years."

This is the testimony of sales made by appellants themselves to the trade, and it is a well known fact that the trade purchase from publishers at a reduced price.

These witnesses were called by appellee, but their evidence of prices is fully corroborated by appellants testifying on their own behalf. A. P. Callaghan, one of appellants, testified on their behalf that June 2, 1877, he sold a copy of their reprint of volume 32 and November 27, 1877, sold a copy of their reprint of volume 33, the first at $6 and the second at $7.50.

Mr. Clark, one of the appellants, testifies, page 629:

"In February, 1877, we made an announcement of the reprint of volumes 1 and 19 to 38 inclusive; twenty-one volumes, $6, when sold separately, and $5 when sold in sets. The price, $5, in sets of twenty-one, $105, or $6 for odd volumes, and that was the price they were sold at.

"Q. Were the prices substantially the same through the period in which you were selling your edition of 39 to 46?

"A. The price has never been less to my knowledge —*that is, as a rule.* THE RULE WAS TO SELL AT THIS PRICE. In isolated cases, the price may have varied one way or the other."

This evidence corroborates the witnesses, Bartlett and Beckwith, upon this point. Clark so testified in 1884. This evidence is clear, unmistakable and fixes the market price made by appellants covering the period embraced in this accounting beyond dispute. This evidence is not contradicted in any respect, and no attempt was made to explain or weaken its effect.

Clark testified that he had been the traveling salesman for years, before he became a member of the firm of Callaghan & Co. He was thoroughly familiar with the wholesale and retail prices of these volumes. He testified from his memory, which was not corrected from the books of appellants. It was not necessary for him to refer to these books; he had probably made most of these

sales himself. If this evidence could have been varied or modified by the account of sales entered in the books of Callaghan & Co., such evidence would have been produced; but, on the contrary, the books were so kept that the prices could not be determined.

Upon this point J. H. Clements testifies (page 611):

"Q. You say that you got the average price per volume of those sold separate from other books at $\$5.48\frac{8}{10}$; and also in your column headed 'total receipts' at $\$5.58\frac{8}{10}$, you use the same average in the column including those sold with other books as well as those sold separately?

"A. Because so many were sold with other books, and the way I found the sales on the books I could not get at the price for these volumes, 39 to 46."

This witness upon an examination of the books of account of Callaghan & Co. could not determine the prices at which most volumes in question were sold.

Appellants called on their behalf J. E. Callaghan, one of the appellants, who testified (page 602), that a set of the Illinois Reports was sold to Mr. McCoy, in Morrison, Illinois, in which volumes 39 to 46 were included, and were figured in at $\$5.62\frac{1}{2}$ per volume; that less than a set, that is, 19 to 46 inclusive, were sold to Mr. Joslyn, of Woodstock, Illinois, in which that part of the volumes in controversy were included at an average price of $6 per volume. (Page 604.)

What makes the market price of books?

In this case it clearly appears that appellants had three prices; one price at which they sold volumes 32 to 46 in a lot with other books, a higher price at which they sold volumes 32 to 46 in lots by themselves, and a still higher price at which they sold single copies of volumes 32 to 46.

Which price should be adopted and control in fixing the profits belonging to appellee? Clearly the last, because the others are unknown.

This rule was applied in the Tremolo Patent case, *supra.*

The evidence of Beckwith and Bartlett established the fact that appellants were selling these volumes at $7.50, with a discount to the trade. This evidence was furnished by appellee and supported by the evidence of Clark and A. P. Callaghan above shown. The presumption is that the other volumes included with other books were put in at the same price with the same discount. If this was not so, the burden was upon appellants to so show. Failing to do this, the conclusion is inevitable that they must be charged with the entire sales upon the price as shown, as to the infringing volumes sold separately as such or singly. When the entire set of reports were sold they numbered from seventy-five to eighty-five volumes, depending upon the year of each sale. From 47 and upward belonged to Mr. Freeman. He retailed his at $3.50 per volume, except 73, 74 and 81, and those were sold at $2.25 per volume. How many of the volumes at $3.50 or $2.25 were included, when more than the volumes from 32 to 38, inclusive, or from 39 to 46, inclusive, were sold, does not appear in the evidence, and appellants did not attempt to separate them. At what price they were so included cannot be known. No evidence was offered to show that defendants only sold 428 copies of volume 32 during the years 1877 to 1881, both inclusive, or at the sum of $1,990.81. The tabulated table of sales furnished by appellants, simply recites: "No. copies sold 428, total receipts, $1,990.81."

Appellants did not testify that this was the aggregate selling price fixed separately from the other books in the lot. Appellants have been found guilty of piracy, of deliberately violating the law of Congress. No presumption can be indulged in their favor. Every presumption is against them and must be overcome by evidence clear and certain. Every presumption is indulged in favor of the injured party, and where the evidence is sufficient to justify the court to act without palpable injustice to the wrong-doer it will not hesitate to give the full benefit of every favorable presumption to the extent required to correct the wrong.

In *Rubber Co.* v. *Goodyear*, 9 Wall., 803, the infringer urged the same objections to the accounting here presented by counsel for appellants. The books in this case were kept as in the case at bar. The accounts commingled the property. The infringer sold with the infringed patented article attached to unpatented material, and upon this unpatented material, in the accounting claimed that it should be allowed its share of the profits.

In the case at bar appellants contend that books, not infringements, sold in the same lot with infringing books, should take their portion of the profits, and more—that the *unknown* selling price of infringing books with others should be fixed lower *by imaginary approximation* than the price at which the infringing books were sold alone. Upon this question in the case last cited, this court held:

"He (the master) refused to allow the profits due to elements not patented, which entered into the composition of the patented articles. There may be cases in which such an allowance would be proper. This is not one of them. The manner in which the books of the Providence Company were kept, renders such an

account impossible as to the business done in their name. The conduct of the defendants in this respect has not been such as to commend them to the favor of a court of equity. Under the circumstances, every doubt and difficulty should be resolved against them. The allowance was properly denied." Citing in the opinion in support of this rule—

Lupton v. *White*, 15 Vesey, 432.
Copeland v. *Crane*, 9 Pick., 79.
Dexter v. *Arnold*, 2 Sumner, 109.
Miller v. *Whittier*, 36 Me., 585.

A critical examination of the evidence reveals the fact that appellee furnished the best evidence of a price certain at which part of these books were sold, which was not disputed, but corroborated by testimony of appellants.

Mr. Bishop was directed to find "the market value of each of said books prior to such publication by the defendant." Under this direction he found and reported to the court (transcript 65):

"I find further that the market value of said books prior to said illegal publication was $7.17 per volume, as shown by sales of books then out of print."

Had this price been adopted, the profits would be $14,599.55, instead of $6,986.05 as reported by Mr. Bishop.

The evidence shows without dispute that these sales referred to by the master, were made after the publication of the reprints by appellants.

The evidence of Bartlett, Beckwith, Clark and Callaghans as to the selling price of these reprints was based upon sales made by appellants long after their reprints were out of the press and upon the market.

J. E. Callaghan, upon this point, testified (Trans., 540):

"Q. I am asking you about the sales made by Callaghan & Company of the reports in question. Were many of those sold in sets?

"A. Yes, sir.

"Q. You say four out of every five were sold in that way?

"A. I think so; yes, sir.

"Q. Four-fifths, then, of the volumes in question were sold in full sets of Illinois Reports?

"A. I think so, sir.

"Q. Is that the information that you have obtained from examination of the books?

"A. Derived from examination of the books; yes, sir."

This testimony shows that it was only in the power of appellants to furnish the master and court with the exact price at which every pirated volume was sold in every instance. If it was not in their power so to do, it was their fault, and under the ruling stated in the *Rubber Company* v. *Goodyear*, *supra*, they must suffer the consequences, and, notwithstanding the selling price was fixed by both masters and confirmed by the court at a lower price than this rule would justify, appellee is content, and only shows to the court that the price ought to have been much higher and the profits much greater, not only in answer to counsel's argument, but to show that appellants ought to be content and congratulated by an affirmance of the decree.

Mr. Bennett disallowed profits on the 156 copies resold, and Judge Blodgett allowed them. The law of Congress provides: "That every person who * * * shall sell or expose to sale any copy of such book, shall also forfeit and pay such damages as may be recovered," etc.

Under this provision of the law, every person selling

becomes liable. It makes the second vendor equally liable with the first. A second sale is no less injurious to the owner of the copyright than the first. Both sales supply a demand which only the owner of the copyright is authorized to supply. In both cases the owner of the copyright has been deprived of the selling himself and realizing his profit directly. He is therefore legally entitled to the profits of both sales made by the infringer.

Mr. Bennett's report covered volumes 39 to 46, inclusive. Defendants admit that they had no means by which to fix the exact price at which they sold all the unlawful copies. The entries of sales in their books of account threw no light upon this question. Appellants submitted to the master a *theory* for a price, and appellee submitted *evidence* from which the price could be easily and fairly ascertained. The master found an average between the *theory* of appellants and the *evidence* of appellee. The exact selling price could not be ascertained from the books of defendants, because they commingled the sales of the unlawful volumes with others, and in that way made it impossible to ascertain the exact truth from their account of the transactions.

In *Mason* v. *Graham*, 23 Wallace, 276, the master reported that the profits resulting from the manufacture and sale of certain patented loom-motions, had been mingled with the profits from the manufacture of looms. He further reported that the cost of making the looms, including the motions, was $59.63; cost of motion, 45½ cents each, or 91 cents for each loom; that the profits resulting from the manufacture of each loom, including pair of motions, was $5.64. Assuming these facts, appellant insisted that he should have been charged with only $8\frac{6}{10}$ cents as the profit made by him on each pair of motions, or, compar-

ing the same proportion to $5.54, the whole profit on looms, which 91 cents, the cost of a pair of motions, bore to $56.63. The court held:

"To this we cannot assent. It appears from the master's report, that the defendant sold 414 pairs, separately from the looms, at $2 per pair, and 297½ other pairs for $534.75. These sales furnish a much better measure of profits than is a ratable proportion of the profits on an entire loom. It may be fairly presumed from them that the profits on the sale of looms, with the motion attached, were increased by the infringing device quite as much as was the profit on the motions sold separately."

This rule is directly applicable to the point in argument. We have the evidence of Clark, Callaghans, Beckwith and Bartlett, and showing separated sales of the infringing books fixed by appellants. As in the case cited, they had the actual selling price of a certain number of the pirated books sold alone. The court held, that the actual selling price of $2 for each pair of motions separated from the loom should be the basis upon which to fix the selling price, or selling value, of the motions attached to the loom. So, in this case, the price of separate selling shown by these witnesses should be taken as the price of all the other volumes sold with other books.

MORE OF THE GENERAL EXPENSE ACCOUNT SHOULD HAVE BEEN DISSALLOWED.

The only witness called upon the general expense account was Mr. Beck. He testified that for about six years, to May, 1880, he was shipping clerk for appellants, and then bookkeeper.

He testified: "Q. State whether you have made from the books of Callaghan & Company an estimate of the expense of transacting their business from 1877 to 1880?

"A. I have."

He offered a statement of what purported to be the general expense account. The first column indicated salaries, postage stamps, and fuel. The second, traveling expenses for the year. This covered the cost of keeping traveling men on the road, railroad fares, hotel bills, etc. The third, insurance expenses; fourth, rents; fifth, interest for the year; sixth, total expenses; seventh, gross sales. Also a column showing average expense of doing the business.

"Q. I will ask you to state whether these different columns are accurate statements of the different items of expense therein mentioned for each year in question?
"A. Yes, sir."

A shipping clerk, a stranger to the books, testifying to accounts he never made.

He attempts to give the annual sales, their total amounts, and the average per cent., cost of expense for transacting the same, stating that this account does not include losses or bad debts.

He testified that appellants drew out in 1877, $12,500; 1878, $12,500; 1879, $12,750; 1880, $13,000, making an aggregate of $54,833.80, including $2,083.50 for legal expenses of appellants in this suit. On cross-examination he admits that he cannot state the amount of any one item included in the expense. This is the substance of this witness' testimony, and is all the evidence there is in the case on the question of expense, general or special, and this, too, from a shipping clerk, who had been bookkeeper for about ten months before he testified. The cross-examination of this witness was not completed. On the hearing before Mr. Bennett, appellants submitted this unfinished testimony for the consideration of the master. Counsel for appellee objected, and this objection was sub-

mitted to his honor, Judge Blodgett, for decision, who ruled that counsel had the right to further examine the witness. Upon such examination he testified that he had prepared a more complete statement but "believed" he had destroyed it; that appellants' books would show the items of which the aggregates in his statements theretofore submitted were composed, but without the presence of these books he could not give the amount or item of any part of such statement. Appellants were then requested to produce witness' additional statement or the books, and they refused. This was the sum total of the testimony upon the question of the expense of appellants' business, over twelve per cent. of which was charged against the profit of appellee. If this expense account was legitmate, the books would so show.

NO WEIGHT SHOULD BE GIVEN TO THE STATEMENT OF GENERAL EXPENSES OFFERED IN EVIDENCE BY APPELLANTS.

J. E. CALLAGHAN, one of the appellants, testified, page 643:

"Q. Now, I want to know what you mean by 17 per cent. expense account, and why you included that column in your consolidated statement?

"A. My understanding of that is the deposition of George W. Beck shows that it cost us 17 per cent. of our gross sales to carry on our business, and therefore we applied that 17 per cent. to the gross sales of these volumes of the Illinois Reports in question and obtained the column headed 'Expense Account, 17 per cent.'

"Q. Did you make the statement upon which the 17 per cent. was computed as shown by the deposition of George W. Beck, (page 644)?

"A. No, sir.

"Q. *Then you have no personal knowledge of its accuracy?*

"A. *I have not; no, sir.*

"Q. And in computing this 17 per cent. you have assumed the correctness of his figures?

"A. Yes."

George W. Beck testified as to this statement which he is credited with having made, and upon which the 17 per cent. was computed, that he was not bookkeeper during the years 1877, 1878 and 1879. (Page 657.)

"Q. Well, then, Mr. Beck, you have no personal knowledge, as I understand from your testimony, of any of the items which are included in any of the columns in this Exhibit A, except from May, 1880?

"A. Yes; there were some days, and sometimes two or three weeks at a time during these years I kept the books while the bookkeeper was away.

"Q. With the exception of these intervals and from May, 1880, have you any knowledge of the correctness of the items which constitute these aggregates in Exhibit A, than the entries on the books? (Page 658.)

"A. No, sir."

If it was competent to charge any proportion of the general expense account against these profits, the entries in the books of the items aggregating the general expense account shown in this statement should have been proven by the person making such entries, or by some person having actual knowledge of such disbursements, without reference to the books. This is the general rule in all cases where entries in books of one party is offered on behalf of such party against a stranger to the books.

Appellants called Mr. Hanlon upon this point, who testified, (page 641):

"Q. Have you any personal knowledge of the correctness of the figures contained in the statement of George W. Beck, or that of James E. Callaghan, to which you refer?

"A. No personal knowledge of the figures in the statement of George W. Beck in regard to this account here—this 17 per cent. on the total receipt, I guess it is. I did not figure this 17 per cent. in any way; we took the 17 per cent. from this statement that was sworn to by Mr. Beck.

"Q. And the total receipts you took from the statement prepared by James E. Callaghan?

"A. Yes, sir."

This is all the proof offered by appellants to authenticate the statements of general expense receipts and the finding of the 17 per cent. of the general expense account which they insist should be charged against the profits.

Each of these witnesses depended upon the evidence of the other as to the accuracy of the statement, and each one testified that he had no personal knowledge upon the subject.

Counsel for appellee moved the master to reject this statement of general expense so offered in evidence in view of the evidence above given. The master held (page 649):

"The columns headed 'Expense Ac.' and 'Total Cost' in exhibit 1, of James E. Callaghan's evidence taken on this reference, being based wholly on these portions of exhibit A to Beck's evidence, must also be disregarded as evidence in this case, but there is more or less evidence tending to support the other columns contained in exhibit 1, to James E. Callaghan's evidence, and it will, therefore, be admitted in evidence, *and given such weight as in the light of the other evidence in the case it may seem to merit.*" *etc.*

Upon like grounds the master excluded or refused to consider the items in the general expense account referred to by counsel in his argument. The error committed by the master was in *not* rejecting the entire general expense account for want of sufficient proof.

This action of the master was fully approved and confirmed by the court.

Why did not one of appellants or the bookkeeper who recorded the transactions make an intelligent and authentic statement of account under oath? *The answer is apparent. The position of counsel was then and is now that the burden was upon the plaintiff to prove both disbursements and receipts.* The court held this position of counsel *untenable*, and thus the *absence* of any evidence on their business on this point.

In the Tremolo Patent case, 23 Wallace, 528, held: "In the ascertainment of the profits made by them (defendants) from the sales, they were allowed to prove the general expenses of their business incurred in effecting the sales, etc., and deduct a ratable proportion from the profits," etc.

Had appellants' books been kept so as to have shown the transactions as they actually occurred, namely, the true sales of the unlawful books and actual price received therefor, and an account of general expenses so arrranged and entered that the portion actually contributed by these sales could have been accurately ascertained, they might have been entitled to the application of the rule stated in the case cited. But the cases are not analagous. The court will observe that in the Tremolo Patent case the infringement only covered a part of the instrument. Sales were made both with and without the infringing attachment. The part infringed was capable of separation, still leaving a salable instrument. Such is not the case at bar. The infringing part of appellants' books could not be used alone. The lawful and unlawful parts were inseparable, and upon this ground we contend that no part of the general expense should have been deducted

from the sales. It was not shown in the evidence that the sales of these piratical volumes necessitated or occasioned the increase of rent, the use of more fuel, gas, clerks, or traveling men, or that the traveling men's hotel bills or salaries were increased one cent by reason of adding these unlawful books to the large list of law reports and text books published, advertised, and sold by appellants, nor was it shown that the rent of the store in Chicago was increased, that more commodious quarters were required.

In all cases holding that the sales of pirated or infringing articles shall bear their proportion of the general expenses and be charged to the profits coming to the injured party, it clearly appears that the pirated or infringing article made and sold, constituted the entire business of the infringer, or that the infringing part was clearly separable, as in the case of the Tremolo Patent, and that the wrong-doer had so recorded the sales and transactions in his books of account that that part of the general expenses properly chargeable against the sales could be clearly and accurately shown.

In the class of cases to which the one at bar belongs, the rule stated in the *Rubber Company* v. *Goodyear* is universally applied.

I submit there was no error in the disallowance of the amounts drawn by appellants, the cost of stereotyping, the cost of editorial work; that there is no ground of complaint because the cost of production was distributed over the volumes sold and unsold, and that profits upon resales were properly charged.

In *Mowry* v. *Whitney*, 14 Wall., 653, held:

"The profits which are recoverable against an infringer

of a patent, are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits they are really damages, and unliquidated until the decree is made."

The same rule applies to the case at bar, so far as the measure and purpose of the profits are concerned. The amount therefore decreed appellee, not only represents profits, but are to him, until the decree fixes the amount, the unliquidated damages resulting from the infringement.

In *Manufacturing Co.* v. *Cowing*, 105 U. S., 255, the court approved the ruling stated in *Mowry* v. *Whitney*, *supra*, and distinguished between cases in which the infringing part can be disassociated from the whole, and the two sold and used separately. Upon this point the court held:

"It does not necessarily follow from this that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. * * * (Page 256.) Unless the appellees got the improved pump, they could not become competitors in that field, and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were, therefore, necessarily the profits they made on the entire sale."

The court finds that the best evidence for the estimation of profits was not furnished by the infringers, nevertheless the court takes the evidence as it appears and gives the advantage in the estimate to the party injured, and upon this point held:

"As it is, we have made the best estimate we can from the material furnished in the record, and conclude that a reasonable allowance for profits will be $15 on each pump, or $4,470 in all."

So in the case at bar. After the infringement, the unlawful part of the book and the legal part could not be separated so as to use the one without the other.

I have not attempted to review the argument of counsel in detail, but have attempted to answer his extended analysis in propositions and groups.

Appellants attempted to purchase the copyright and have the exclusive control of the market. Appellee refused to sell. They then infringed his copyright, pirated his book for the purpose of crushing him and driving him out of the market. *It is the pump case repeated.* Appellee was in the market. His copyright had been secured, his books reprinted and stereotyped. He had the right to furnish the market from his own provided sources, and already acquired facilities, fully paid for, without a further imposition of cost for the living and personal expenses of the Callaghans and their associates, without the services of Messrs. Ewell and Denslow, without paying for useless stereotype plates, rent, fuel, clerk-hire, traveling salesmen not needed by him, and that imposition, the result of the deliberate and willful wrong committed against him by appellants, with full notice of his rights in the premises.

In *Pike* v. *Nicholas*, L. R. 5 Ch. App. Cas., 260, the vice-chancellor, in fixing a basis upon which the profits in such cases should be determined, held:

"The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he (plaintiff) would have received from the sale of so many additional copies."

This rule rightfully eliminates the general expense account from all consideration in ascertaining the profits. Mr. Bennett refused to charge the sale of 200 copies with any part of the general expense, because these 200 copies were sold after the year 1880, and no evidence of general expense was offered from and after 1880, or covering the period of these sales; therefore, the master could not charge any part of the general expense occurring prior to 1880 to sales made after 1880.

With all leniency clearly manifested in the proceedings and decreed in this case in favor of appellants, and all errors of record, if any, against appellee, he submits that the scant reparation for the grievious wrong inflicted and the injury suffered, may be assured to him by the affirmance of the decree of the court below.

Respectfully submitted,

G. W. KRETZINGER,
Counsel for Appellee.

Chicago, October, 1888.

NOTE: The table of comparisons of the edition of appellants with appellee's of volumes 39 to 46, inclusive, is hereto attached and respectively submitted with and as a part of this argument.

VOLUME 39, ILLINOIS REPORTS.

(Myers' Edition.) | (Callaghans' Edition.)

MARTIN *vs.* BARNHARDT.

(Head Note.)

Page 9.

3. * * * "Judgment entered *upon the* verdict for $3,000, and costs."

Page 10.

(3) * * * "Judgment entered *upon the* verdict for $3,000 and costs."

NOTE.—The language of the Court, page 13, is: "Judgment on verdict for three thousand dollars and costs."

Freeman misquoted the Court, and Callaghan copied Freeman.

WILLIAMS *vs.* FRANKLIN COUNTY.

(Statement of Case.)

Page 21.

The case is stated in the opinion of the Court.

Page 22.

The case is stated in the opinion.

BOND *vs.* THE PEOPLE.

(Head Note.)

Page 26.

1. INSTRUCTIONS—*should not assume facts as proven.*

3. GENERAL VERDICT *of "guilty"—in criminal cases.*

Pages 26, 27.

(1) INSTRUCTIONS: *Should not assume facts as proved.*

(3) GENERAL VERDICT OF GUILTY: *Sufficient in criminal cases.*

BUCHTER *vs.* DEW.

(Head Note.)

Page 40.

1. MECHANIC'S LIEN—.

2. PARTIES—*who may sue where one creditor receives more than his pro rata share.* If one of the creditors in such case receives from the sheriff who made the sale more than his pro rata share of the proceeds, the other creditors may have a right to sue for the excess, but the suit cannot be brought by the sheriff.

Pages 40, 41.

(1) MECHANIC'S LIEN:

(2) PARTIES: *Who may sue for the excess when one creditor receives more than his share.*

If the sheriff making sale of the property subject to the lien pays one creditor more than his pro rata share of the proceeds, the other creditors may sue for the excess, but the suit cannot be brought in the name of the sheriff.

NOTE.—It must be evident that the Callaghan note was taken from Freeman. The latter portion is in the exact words. This is not a case where the note is a mere repetition of the opinion.

Page 83.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

SECOND GRAND DIVISION.

JANUARY TERM, 1856.

Page 83.

CASES

DECIDED BY THE

SUPREME COURT

OF

ILLINOIS.

SECOND GRAND DIVISION

JANUARY TERM, 1866.

PHILLIPS *vs.* CITY OF SPRINGFIELD.

(Head Note.)

Page 83.

1. INTRUDER—*may be ejected by the party in possession.* Where one is in the lawful possession of premises, he has a right to eject an intruder thereon, using no unnecessary force in so doing.

3. HOMESTEAD—*abandonment*—.

Pages 83, 84.

(3) INTRUDER: *May be ejected from premises by party lawfully in possession.*

A party in the lawful possession of premises may rightfully put out an intruder on such possession, using no unnecessary force in so doing.

(1) HOMESTEAD: *Abandonment.*

NOTE.—The language of the opinion is: "The complainant, Mrs. Emmons, was an intruder upon the lawful possession of Clinton, and he had a right to put her out without using unnecessary force."

The Callaghan note is a palpable use of that of Myers; the last seven words are identical:—"using no unnecessary force in so doing."

MORRILL *vs.* SWARTZ.

(Head Note.)

Page 108.

1. TAX TITLE—.
2. SAME—.
3. SAME—*report of collector, when insufficient.*

Page 109.

(1) TAX TITLE:
(2) SAME:
(3) SAME: *Report of collector; when insufficient.*

STEVENS *vs.* COFFEEN.

(Head Note.)

Page 148.	Page 148.
1. PRACTICE IN CHANCERY—.	(1) PRACTICE IN CHANCERY :
5. COMPOUND INTEREST — *what constitutes.*	(3) COMPOUND INTEREST : *What amounts to.*
6. MEASURE OF DAMAGES—.	(6) MEASURE OF DAMAGES :

TOPPING *vs.* MAXE.

(Head Note.)

Page 159.	Page 159.
1. NEW TRIAL—*verdict contrary to the evidence.*	(3) NEW TRIAL : *Verdict contrary to the evidence.*

TOMLIN *vs.* GREEN.

(Head Note.)

Page 225.	Page 225.
4. DAMAGES—*in an action on an appeal bond in forcible entry and detainer.*	(4) DAMAGES: *In suit on appeal bond in forcible entry and detainer.*

MOORE *vs.* NEIL.

(Head Note.)

Page 256.	Page 256.
2. RECITAL IN DECREE—*cures defective certificates of publication.*	(2) RECITAL IN DECREE : *Cures defective certificate of publication.*
6. FORMER DECISION.	(5) FORMER DECISION :

STEERE *vs.* HOAGLAND.

(Head Note.)

Page 264.	Page 264.
1. CREDITORS' BILLS—.	(1) CREDITORS' BILLS :
4. SAME—*will lie on justice's judgment.*	(5) SAME : *Will lie on justice's judgment.*

MCCONNEL *vs.* SMITH.

(Statement of Case.)

Page 280.	Page 280.
APPEAL from the Circuit Court of Morgan County.	APPEAL from the Circuit Court of *Morgan* County.

MCLAURIE *vs.* THOMAS.

(Statement of Case.)

Page 293.	Page 293.
The facts in this case are fully stated in the opinion.	The case is fully stated in the opinion.

ST. LOUIS, ETC., R. R. CO. *vs.* MONTGOMERY.
(Statement of Case.)

Page 336.	Page 336.
APPEAL from the Circuit Court of Madison county.	APPEAL from the Circuit Court of *Madison* County.
The facts in this case are stated in the opinion.	The case is stated in the opinion of the Court.

THE GREAT WESTERN R. R. CO. *vs.* HAWORTH—(P. 351).

Seventh line from bottom of page 351, Freeman inserted the following, which Denslow copied :

" Plaintiff's fourth instruction is too broad. It entirely ignores the question of negligence on their part. The jury, under this instruction, may have supposed that they were at liberty to find for plaintiffs, notwithstanding they had themselves been guilty of negligence which materially contributed to the injury. And as such is not the law, this instruction may have misled the jury, and it should, therefore, have been modified or refused."

Again, fifteen lines from top of page 352, Freeman also inserted the words " defendants in error " for " appellees," as written in the " original opinion on file in the handwriting of the Judge." Denslow copied it.

A certified copy of the original opinion is handed to the court.

HEADLEY *vs.* SHAW.
(Head Note.)

Page 354.	Page 355.
5. VENDOR AND PURCHASER: — *which must prepare the deed.*	(5) VENDOR AND PURCHASER: *Which must prepare the deed; tender of.*

HUNTER *vs.* BILYEU.
(Head Note.)

Pages 367, 368.	Pages 368.
1. PLEADING — *Judgment on a plea not answered.*	(1) PLEADING : *Judgment on plea not replied to.*
2. SAME—.	(2) SAME :
4. COSTS—.	(3) [368*] COSTS :
5. VENDOR AND PURCHASER — *payment of the purchase money, etc.*	(4) VENDOR AND PURCHASER : *Payment of purchase money, etc.*

(Statement of Case.)

WRIT OF ERROR to the Circuit Court of Bond county.	ERROR to the Circuit Court of *Bond* county.

NOTE.—Observe Mr. Freeman's page "368," inserted by Denslow at paragraph (3) in head note; also at pages 389, 394, 402, 418, and throughout the book. The compositor certainly had Freeman's pages before him to copy from.

PACKWOOD *vs.* GRIDLEY.

(Head Note.)

Pages 388, 389.	Pages 388, 389.
3. VENDOR AND PURCHASER—*rights of a purchaser who pays off an incumbrance.*	(3) VENDOR AND PURCHASER: *Right of purchaser to pay off incumbrance.*
8. SPECIFIC PERFORMANCE—.	(9) SPECIFIC PERFORMANCE:
9. PARTIES IN CHANCERY—*bill for specific performance.*	(10) PARTIES IN CHANCERY: *On bill for specific performance.*

HADLEY *vs.* MORRISON.

(Head Note.)

Page 392.	Pages 393, 394.
1. JURISDICTION IN CHANCERY—.	(7) JURISDICTION IN CHANCERY:
3. USE AND OCCUPATION—*action therefor prior to the act of 1861.*	(1) USE AND OCCUPATION: *Action therefor prior to act of 1862.*
4. SAME—*under the act of 1861.*	(2) SAME: *Under act of 1861.*
5. SAME—*construction of the act of 1861.*	(5) SAME: *Act of 1861 construed.*

BROWN *vs.* THE PEOPLE.

(Head Note.)

Page 407.	Page 407.
1. JUSTIFIABLE HOMICIDE—*defending one's habitation.*	(1) JUSTIFIABLE HOMICIDE: *In defense of one's habitation.*
2. SAME—*of the effect of subsequent expressions of defendant.*	(2) SAME: *Subsequent expressions of prioner; effect of.*

STONE *vs.* SMOOT.

(Head Note.)

Page 409.	Page 409.
1. CROSS-BILL—.	(1) CROSS-BILL:
3. NOTICE—.	(3) NOTICE:

RIVARD *vs.* WALKER.

(Head Note.)

Page 413.	Page 413.
1. DEED—*what amounts to a delivery of between adults.*	(1) DEED: *What amounts to delivery between adults.*
2. SAME—*as to infant grantees.*	(2) SAME: *As to infant grantees.*

BOWMAN *vs.* WETTIG.

(Head Note.)

Pages 416–418.	Pages 416–418.
1. A TOWN PLAT—*not a necessary muniment of title.*	(1) TOWN PLAT: *Not a necessary muniment of title.*
6. ACKNOWLEDGMENT OF DEEDS—*out of this State, under act of 1819.*	(6) ACKNOWLEDGMENT OF DEEDS: *Out of this State; how taken under act of 1819.*
8. SAME—*Under the acts of 1822 and 1847.*	(8) SAME: *Under acts of 1822 and 1847.*
9. SAME—*of the certificate of conformity.*	(9) SAME: *Certificate of conformity, etc.*
14. TAX DEED—.	(16) TAX DEED:
15. COLOR OF TITLE—.	(17) COLOR OF TITLE:
19. PRACTICE—*time for offering instructions.*	(21) PRACTICE: *Rule of court as to time of offering instructions.*
20. DESCRIPTION OF LAND IN A DEED—*of the certainty required.*	(10) DESCRIPTION OF LAND IN DEED: *Degree of certainty required.*

THE ST. LOUIS, ALTON & TERRE HAUTE R. R. CO. *vs.* LINDER.

(Statement of Case.)

Page 433.	Page 433.
WRIT OF ERROR to the Circuit Court of Coles County.	ERROR to the Circuit Court of Coles County.

RUCKER *vs.* WHEELER.

(Head Note.)

Page 436.	Page 437.
1. APPEAL BOND *in forcible detainer—may cover accruing rents.*	(1) FORCIBLE DETAINER: *Appeal bond in, may cover accruing rents.*

FITZSIMMONS *vs.* ALLEN'S ADMINISTRATOR.

(Head Note.)

Page 440.	Page 440.
1. STATUTE OF FRAUDS—.	(1) STATUTE OF FRAUDS:

SHOOK *vs.* PEOPLE.

(Statement of Case.)

Page 443.	Page 445.
AGREED case from *the* Circuit Court of St. Clair county.	AGREED CASE from Circuit Court of *St. Clair* County.

THE ST. LOUIS, ALTON, ETC., R. R. CO. *vs.* GILHAM.

(Statement of Case.)

Page 456.	Page 456.
APPEAL from the Circuit Court of Madison County.	APPEAL from the Circuit Court of *Madison* County.

HAVEN *vs.* WAKEFIELD.

(Head Note.)

Page 509.	Pages 509, 510.
1. LEASE—*what constitutes.*	(1) LEASE: *What may constitute.*
3. JURISDICTION *in chancery, etc.*	(3) JURISDICTION IN CHANCERY, *etc.*
6. LESSOR AND LESSEE—.	(4) LESSOR AND LESSEE:
7. MEASURE OF DAMAGES—.	(6) MEASURE OF DAMAGES:

BLAIR *vs.* CHAMBLIN.

(Head Note.)

Page 521.	Page 522.
1. REDEMPTION BY JUDGMENT CREDITOR—.	(1) REDEMPTION BY JUDGMENT CREDITOR:

(Statement of Case.)

Page 523.	Page 524.
APPEAL from the Circuit Court of Mason county.	APPEAL from the Circuit Court of *Mason* County.

MAHER *vs.* BULL.

(Statement of Case.)

Page 532.	Page 532.
APPEAL from the Superior Court of Chicago.	APPEAL from the Superior Court of Chicago.

CARTER *vs.* MOSES.

(Statement of Case.)

Page 540.	Page 540.
APPEAL from the Superior Court of Chicago.	APPEAL from the Superior Court of Chicago.

BOARD OF SUPERVISORS *vs.* THOMPSON.

(Head Note.)

Page 566.	Page 566.
1. SWAMP LANDS—.	(1) SWAMP LANDS:
2. * * * Where a purchaser of swamp lands from a county seeks to recover back the purchase money paid therefor, upon the ground that a trust was devolved upon the county, *under the several laws on that subject*, requiring the application of the proceeds of the sale of swamp lands to their drainage, and that the money has been diverted to other purposes, the remedy, if any exists, is in chancery and not at law.	(2) * * * Where a purchaser of swamp lands from a county seeks to recover back the purchase money paid therefor, on the ground that a trust was devolved upon the county, requiring the application of such purchase money to the drainage of such lands, and that the money had been diverted to other purposes, the remedy, if any exists, is in chancery and not at law.
3. SAME—*consent will not give jurisdiction.*	(3) SAME: *Consent will not give jurisdiction.*
And where an action of assumpsit was brought in such case, it was held that a stipulation by the parties that no advantage should be taken, in re-	Where in such case an action of assumpsit was brought, and the parties entered into a stipulation that no advantage should be taken in re-

gard to the form of action or the condition of the pleading, would not avail to give the court of law jurisdiction.

gard to the form of the action or the condition of the pleading; *held*, that such stipulation did not give the court of law jurisdiction.

NOTE.—A plain case of piracy, as these notes are not copied from the opinion of the Court.

DICKERSON *vs.* DERRICKSON.

(Head Note.)

Page 574.	Page 574.
2. AVERMENT *of consideration.*	(2) *Averment of consideration.*
3. PROOF *of consideration.*	(3) *Proof of consideration.*

DUNNE *vs.* TRUSTEES OF SCHOOLS.

(Head Note.)

Page 578.	Page 578.
1. FORCIBLE DETAINER—,	(1) FORCIBLE DETAINER:
3. LANDLORD AND TENANT—*when the relation exists.*	(2) LANDLORD AND TENANT: *When the relation exists.*
4. SAME—*tenancy at will—what constitutes.*	(4) SAME: *What constitutes tenancy at will.*

LOCKWOOD *vs.* MILLS.

(Head Note.)

Pages 602, 603.	Pages 602–604.
1. ATTORNEY AT LAW—.	(1) ATTORNEY AT LAW:
6. EVIDENCE IN EJECTMENT—.	(6) EVIDENCE IN EJECTMENT:
7. ACKNOWLEDGMENT OF DEEDS.	(7) ACKNOWLEDGMENT OF DEEDS:
8. ADMINISTRATOR *purchasing at his own sale.*	(8) ADMINISTRATOR PURCHASING AT HIS OWN SALE:
11. NOTICE TO PURCHASER—*what constitutes.*	(11) NOTICE TO PURCHASER: *What constitutes.*

BOARD OF EDUCATION *vs.* GREENBAUM.

(Head Note.)

Pages 609, 610.	Pages 610, 612.
1. PLEADING—*allegation of authority of an agent.*	(1) PLEADING: *Authority of agent; how alleged.*
4. CORPORATE NAME—.	(4) CORPORATE NAME:
6. PLEADING—.	(6) PLEADING:
7. PRACTICE—.	(7) PRACTICE:
8. EXCEPTIONS—*when necessary.*	(8) EXCEPTIONS: *When necessary.*
9. NORMAL UNIVERSITY—.	(9) NORMAL UNIVERSITY BUILDING:
10. SAME—*subject to mechanic's lien.*	(10) SAME: *Subject to mechanic's lien.*

VOLUME 40.

The Table of Practice Cases reported is identical in both editions.

So is the Table of Cases other than practice cases.

The fact that Mr. North has adopted the plan of having two tables of cases, and each table being identical with Freeman's, is conclusive evidence that he used Freeman's tables.

RULES OF PRACTICE—(P. XII.)

Mr. North has copied Freeman's notes to Rules 6, 12, 15, 25, 29, 31, 43, 46, 47, 50, 52, 55, 57, 61, 62, 67, 70, 74.

Mr. North reprints (in 1877), at the end of the Rules (p. xxiv.), the act of 1865, which had been repealed and its substance re-enacted in the Practice act of 1872. (See Rev. Statutes 1874, chap. 110, secs. 68, 73, 74.)

Commencing with page 25, and extending to and including page 130, is taken bodily from Myers' book, as there was no record ever made or kept from which these practice cases could be taken, as the opinions of the court were delivered orally, and the reports of the cases, as prepared by Mr. Freeman, were prepared as the points were decided, running through a space of time from November, 1863, to September, 1867, but were not reported entire in 1868.

On this point argument is useless. There is no question about the facts. Mr. North had no other source of information than Mr. Myers' book. In fact, he so testified as a witness. His work shows it on its face, as his head notes were nearly always literal copies of Mr. Freeman's.

In the entire volume there is not one fact stated in North's edition that is not in Freeman's; nor is there a brief given in the book that is anything more than

a mere condensation of the briefs given in Freeman's. Many statements of facts and briefs are wholly omitted by North.

There are 538 pages of text and syllabi in Freeman's book, and but 500 in North's. (See his page, at bottom of page 538.) Here are 38 pages less matter in North's than in Freeman's book.

The head notes in North's, when they are not a literal copy of Freeman's, or a mere change of his notes, are of a very immaterial and trivial character, while the "annotations" would hardly make a single page.

From the beginning to the ending of the book there is nothing in it that is not in Freeman's, or that could not be prepared by mere verbal changes, omissions and transpositions of Freeman's text and head notes.

The arrangements of head notes are, in nearly all instances, in exact conformity to that of Freeman, and in a great majority of instances the identical "catch-words" are used.

In *Mitchell* v *Chicago*, p. 174, the head notes are identical.

The statements of fact in the cases on pages 166, 251, 303, 310, 335, 344, 346, 359, 362, 418 and 443, are either literally copied, or extracted in Freeman's very words, or but slightly changed.

Compare "catch-words" in cases on pages 160, 253, and, for that matter, all through the book.

On the internal evidence alone, this book is the grossest case of literary piracy on record.

There is absolutely nothing upon which Callaghan can predicate any claim to proprietary rights in this book. It is a pure, unmitigated literary larceny.

This is fully shown by the testimony of Mr. North, the editor.

VOLUME 41.

(Myers' Edition.)

Page 9.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1866.

(Callaghan's Edition.)

Page 9.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1866.

NOTE.—The words used are identical.

YUNDT *vs.* HARTRUNFT.

(Head Note.)

Page 10.

4. INSTRUCTIONS — Although an instruction may be erroneous, yet if other instructions given so explain it that it could not mislead the jury, the judgment will not be reversed because it was given.

Page 10.

(7) INSTRUCTIONS: Though a particular instruction may be incomplete or erroneous. if other instructions so explain or correct it that it could not mislead the jury, it will not be ground of reversal.

NOTE.—Callaghan's note is a bungling attempt to change Freeman's note, so as to make it different.

The matter in the opinion occurs on page 13, and Freeman's note is not copied from the opinion.

NELSON *vs.* OREN.

(Head Note.)

Page 18.

1. DEPENDENT AND INDEPENDENT COVENANTS.

4. TENDER—*when it must be kept good.*

Page 18.

(1) DEPENDENT AND INDEPENDENT COVENANTS.

(3) TENDER: *Must be kept good.*

(Statement of Case.)

APPEAL from the Recorder's Court of the City of Chicago, the Hon. EVERT VAN BUREN, Judge, presiding.

APPEAL from the Recorder's Court of the City of Chicago; Hon. EVERT VAN BUREN, J

DICKEY *vs.* MCDONNELL.

(Statement of Case.)

Page 62.

This was an *action of trespass for an alleged assault and battery*, brought in the court below *by Charlotte A. Dickey against* John *McDonald*. A trial resulted in a *verdict and judgment* in favor of the *defendant*. The *plaintiff* brings the cause to this court by *appeal*.

Page 62.

Action of trespass, for an alleged assault and battery, by Charlotte A. Dickey, as plaintiff, against McDonnell. Verdict and judgment below were for defendant. Plaintiff appeals.

NOTE.—I have *italicized* the words in Freeman's statement copied in Callaghan's book. Almost all the changes were made by omitting words used by Freeman. That the Callaghan statement was taken from Freeman's is palpably evident, as the Judges rarely make statements of facts.

Then the Callaghan statement is followed by this sentence: "The opinion states the facts and ground of appeal,"—showing clearly that the editor must have used Freeman's statement as the basis of his own, as no other statement existed from which he could have taken it.

SHEPARD *vs.* BUTTERFIELD.

(Head Note.)

Page 76.

1. EVIDENCE—*in suit on replevin bond.*

Page 76.

(4) EVIDENCE: *In action on replevin bond.*

STONE *vs.* GREAT WESTERN OIL CO.

(Statement of Case.)

Page 85.

Appeal from the Superior Court of Chicago; the *Hon. Van H. Higgins*, Judge, presiding.

This was an action of *assumpsit*, brought in the court below *by the Great Western Oil Company against* Andreas B. *Stone*, to recover the amount of a sale on the subscription of the defendant to *the capital stock* of the company, in contemplation of its becoming incorporated *under the act of February 18, 1857, authorizing "the formation of corporations for manufacturing, mining, mechanical or chemical purposes."*

Page 85.

Appeal from the Superior Court of Chicago; Hon. VAN H. HIGGINS, J.

Assumpsit, by the Great Western Oil Company as a corporation, against Stone as a subscriber to its capital stock, under the act of February 18, 1057, authorizing "the formation of corporations for manufacturing, mining, mechanical or chemical purposes."

The *defendant pleaded the general issue and nul tiel corporation.*	Defendant pleaded the general issue and nul tiel corporation.
Also, a certain *certificate filed* with *the Clerk of the Circuit Court of Cook County, as follows:*	Also, a certificate filed in the office of the Clerk of the Circuit Court of Cook County, as follows:

NOTE.—Then follows a page and a half of matter, constituting no part of the opinion of the Court, literally copied.

Upon this evidence the Court found the issues for the plaintiff, and assessed the damages at $1,169.57, and entered a judgment accordingly, from which the defendant took this appeal (p. 92).	On this evidence the Court found for the plaintiff, and assessed the damages at $1,169.57, and entered judgment, from which the defendant appealed.

NOTE.—This extract could not have been an accidental coincidence. That the Callaghan is a copy from Freeman will not admit of doubt. Bare inspection shows that.

COOK *vs.* YARWOOD.
(Head Note.)

Page 115.	Page 115.
1. PLEA IN ABATEMENT—*requisites of the affidavit in support thereof.*	(1) PLEA IN ABBTEMENT: *Requisites of affidavit.*

NOTE.—Page 116 must have been printed from the printed page of Myers' book, as no two printers could reproduce a page exactly like another without the other being before him.

DONNELLY *vs.* HARRIS.
(Head Note.)

Page 126.	Page 126.
1. DAMAGES—*mitigation of exemplary.*	(1) DAMAGES: *Mitigation of exemplary.*

CHINIQUY *vs.* CATHOLIC BISHOP, ETC.
(Statement of Case.)

Page 148.	Page 148.
APPEAL from the Circuit Court of Kankakee County; the Hon. Charles R. Starr, Judge, presiding.	APPEAL from Circuit Court of Kankakee County; Hon. Charles R. Starr, J.

NOTE.—This is obviously a copy. The force of this suggestion will more readily appear if the Court will examine cases before and after it in same volume. Callaghan's editor adopted a rule of saying, "Appeal from

Lee " (p. 13), " Appeal from Grundy " (p. 160), omitting the county. In the case cited the editor forgot himself and copied literally from Freeman.

But let us pursue this case further :

This was an action of ejectment in the court below, by the Catholic Bishop of Chicago, against Charles Chiniquy, Achilee Chiniquy, Augustine Fouche, Pierie Morais, Gustave Demars, Lewis Mercier and Abram Peltier.	This was an action of ejectment, brought by the Catholic Bishop of Chicago, against Charles Chiniquy, Achilee Chiniquy, Augustine Fouche, *Piere* Morais, Gustave Demars, Lewis Mercier and Abram Peltier.

NOTE.—While this is an almost literal copy, it is important for another reason. The errors in spelling of the words Achile (spelled Achilee), and Pierre (spelled Pierie), in Freeman, are copied by Callaghan, showing conclusively that they used Freeman's statement of facts.

The balance of the statement is very plainly *appropriated* from Freeman, as the conclusion will show :

The facts upon which the other questions in the case arise are sufficiently stated in the opinion of the court (p. 150).	The facts on which all the questions in the case arise appear sufficiently in the opinion of the court.

NOTE.—This is almost a literal copy from Freeman.

GARDNER *vs.* DIEDERICHS.

(Statement of Case.)

Page 160.	Page 160.
On the 24th day of February, 1860, *I. B. Hymer & Co.*, a firm consisting of *Isaac B. Hymer and Addison Weeks, being indebted to Robert Diederichs and Ransom Gardner*, severally *executed to the former their two promissory notes for* the sum of $1,200 *each, one payable one year and the other eighteen months after date, and to Gardner their two other notes, one for the sum of $1,500, payable two years* from date, *and the other for $1,800, payable two years and six months* from date ; all the notes bearing *interest* at ten per cent., payable *annually*.	*Isaac B. Hymer and Addison Weeks*, partners, doing business under the firm name of I. B. Hymer & Co., *being indebted to Robert Diederichs, and* also to *Ransom Gardner, executed to the former their two promissory notes for $1,200 each, one payable in one year and the other eighteen months* from *date*, with interest annually ; *and to Gardner their two other notes, one for $1,500 at two years, and the other for $1,800* at *two years and six months.*
On the same day Hymer *and Weeks* and *their wives*, etc.	On the same day Hymer and Weeks, with their wives, etc.

NOTE.—This copying is too literal to be a coincidence. It will not do for counsel to pretend that Calla-

ghan gathered the facts from the trust deed. While the facts are in the trust deed, *they are not stated in the words used by Freeman and copied by Callaghan.*

KUCHENBEISER *vs.* BECKERT.
(Statement of Case.)

Page 172.
WRIT of error to the Superior Court of Chicago.

Page 172.
WRIT of error to the Superior Court of Chicago.

NOTE.—Here, again, the editor forgot himself in not making his accustomed change in Freeman by omitting the words "Writ of."

The same thing occurs in *Russell* v. *Brown*, p. 184, and *Davis* v. *Taylor*, p. 405; while in *Tilden* v. *Rosenthal*, p. 386; *Messervey* v. *Beckwith*, p. 452, and *Doggett* v. *Gage*, the editor of Callaghan's adhered to his rule to drop the words "Writ of."

We do not claim a monopoly of the words dropped. What we claim is this: The editor of Callaghans', to disguise his piracy, adopted a rule of omitting the words "Writ of"; but he sometimes forgot himself and printed Freeman literally.

HASKIN *vs.* HASKIN.
(Statement of Case.)

Page 197.
This was an action of *assumpsit, brought* in the court below *by Henry Haskin against Edwin Haskin, to recover the value of 800 barrels of salt, which the plaintiff* claims he was *obliged to furnish upon a warehouse receipt issued by him in his own name, but as the agent* and while carrying on the business *of the defendant.*

Page 197.
Assumpsit, brought by Henry Haskin against Edwin Haskin, to recover the value of 800 barrels of salt, which the plaintiff was obliged to furnish upon a warehouse receipt, which the plaintiff had issued in his own name, but while acting as the agent of the defendant.

NOTE.—Very literal copy. But not content with copying Freeman's statement of facts, Callaghan's editor copies Freeman's note to the case:

* See *Elston et al.* v. *City of Chicago*, 40 Ill. 514, as to what will be regarded as a compulsory payment (p. 197).

NOTE.—See *Elston et al.* v. *City of Chicago*, 40 Ill. 514.

NOTE.—An annotated edition may be easily prepared where you copy another man's notes.

TOLEDO, P. & W. RAILWAY CO. *vs.* SWEENEY.

(Head Note.)

Page 226.

3. MEASURE OF DAMAGES — *in suit against a railroad for killing stock.*

In a suit against a railroad company for killing the cattle of the plaintiff, where it appeared the weather was warm, and the cattle when found were swollen and unfit for beef, the plaintiff is entitled to a verdict for their full value.

Page 226.

(3) DAMAGES: *Measure of, in suit for killing cattle.*

In a suit against a railroad company for damages for killing cattle, where it appears that the weather was warm, and the cattle when found were unfit for beef, the plaintiff is entitled to the full value of his cattle.

NOTE.—This is a pretty plain case of plagiarism. The words "unfit for beef" are not in the opinion, and must have been copied from Freeman, and they show that the whole note was taken from the same source, with an evident attempt to disguise the fact.

DEININGER ET AL. *vs.* MCCONNELL.

(Statement of Case.)

Page 228.

This is an *action of ejectment, brought by* Murry *McConnell* in the Bureau Circuit Court, *to the September Term, 1864, against* Herman *Deininger* and Lewis Deininger for the recovery of the *S.* E. 23, 15, N. R. 7, E. 4 prin. mer. The *general issue* was filed by defendant. A *trial* was had by *the court, a jury* having been *waived.* * * * *Upon this evidence* the court found the issue *for the plaintiff*, and *defendants* * * * *appeal* (p. 229).

Page 22[illegible].

Action of ejectment, brought by McConnell against Deininger, to the September Term, 1864, to recover S. E. 23, 15, N. R. 7, E. 4 P. M. Plea, the general issue. The trial before the court, a jury being waived, resulted in a finding for plaintiff on the evidence, etc. Defendants appeal.

NOTE.—That this statement by Callaghan was taken from Freeman is clear on the face of it, but what makes it absolutely certain is the fact that Callaghan has copied Freeman's mistake. Freeman says the action was to recover the *S.* E. 23, etc. Callaghans copy this literally. Now, read the first two lines of the opinion of the Court, and it is the *N.* E. quarter, etc.

MILLER *vs.* BRUNS.

(Statement of Case.)

Page 293.

This was an action of assumpsit, brought in the court below by William H. Bruns and Charles Wachsmuth, against George Miller and Robert Stafford, to recover the price of a quantity of highwines alleged to have been purchased by the plaintiffs for the defendants. A trial resulted in a judgment for the plaintiffs, from which the defendant took this appeal.

The only question presented arises upon an instruction given by the court, which will be found in the opinion.

Page 293.

This was an action of assumpsit, brought in the court below by William H. Bruns and Charles Wachsmuth, against George Miller and Robert Stafford, to recover the price of a quantity of highwines, alleged to have been purchased by the plaintiffs for the defendants, etc.

A trial resulted in a judgment for the plaintiffs, and from which the defendant took this appeal.

The only question presented arises upon an instruction given by the court, which will be found in the opinion.

NOTE.—Here the copy *is identical, including the punctuation.* The only difference in the two statements is, in the Callaghan book there is some immaterial matter thrown in.

CHILDS *vs.* GRATIOT.

NOTE.—To paragrah 4 of Freeman's head note is affixed a note, thus:

Page 357.

* But it is correctly printed in Purple's Statutes, and in the recent compilation by Gross, p. 811, § 100.

To paragraph 4 of Callaghan's this note is copied as follows:

Page 357.

* It is printed in Purple's Statutes, in the compilation by Gross, p. 811, § 100,—and subsequent matter is added.

NOTE.—On page 360 Freeman made this note:

At the April Term, 1867, a rehearing of this case *was* asked *upon grounds* which are *set forth in the following supplemental opinion* of the court, *but the* application was denied.

This was copied by Denslow as follows:

At the April Term, 1867, a rehearing was applied for upon grounds set forth in the following supplemental opinion, but the previous decision was adhered to.

NOTE.—This is evidently a plain case of piracy, which cannot be explained away.

ESTY *vs.* SNYDER.

(Head Note.)

Page 363.

1. Where the payee of a promissory note indorses the note in blank and delivers it to another person, *no matter for what purpose*, he thereby holds the latter out to the world as the owner, and a bona-fide purchaser from him, before its maturity, will take a good title.

Page 363.

(1) The payee of a note who endorses it in blank, and delivers it to other persons, *no matter for what purpose*, holds them out to the world as the owners, and a bona-fide purchaser from them before maturity [for value without notice of any defect in the title] gets a good title to the note.

NOTE.—Denslow unquestionably used Freeman's head note in making this note. The words "*no matter for what purpose*," nor anything equivalent thereto, are not in the opinion of the court, and yet Denslow copies them from Freeman.

So anxious was he to cover up his tracks that he actually puts matter (which I have thrown into brackets) into his note that is not in the case at all. His note does not correctly present the question decided by the court.

REESE *vs.* MITCHELL—(P. 365).

NOTE.—Callaghan prints the title of this case as *Rees* v. *Mitchell*, in the body of their book; but turn to the table of cases, and there they have given it correctly, as copied from Freeman, as *Mitchell* ads. *Reese* and *Reese* v. *Mitchell*, giving the final *e*.

This shows a use of Freeman's book.

MALLETT *vs.* BUTCHER.

(Head Note.)

Page 382.

3. FORMER DECISION: The case of *Abrams* v. *Camp*, 3 Scam. 290, is overruled upon this question.

Page 382.

(2) FORMER DECISION: Overruled. The case of *Abrams* v. *Camp*, 3 Scam. 290, is overruled upon this question.

NOTE.—Here is a literal copy of a head note.

WHITE *vs.* WEAVER—(P. 413).

I hand to the court a certified copy of the opinion, from which it appears that the court cited *Kline* v. *Cruiser*, and Freeman changed it to *Klein* v. *Currier*, and Callaghan copied Freeman.

The opinion reads: "What appellee said to Cross, as Haley understood it," etc. Freeman changed it so as to read: "What appellee said to Cross, *if* as Haley understood it," etc., and again Callaghan copied Freeman.

Also, Freeman changed the court's mode of citation of "Ill." to "id.," and Callaghan reprints Freeman.

ELLETT *vs.* TYLER—(P. 451).

NOTE.—At the end of this case is a note made by Mr. Freeman, which is copied as follows:

NOTE.—LAWRENCE, J., having tried the cause in the court below, did not sit on the hearing in this court.	NOTE.—LAWRENCE, J., having tried this case in the court below, did not sit on the hearing in this court.

HARBISON *vs.* HOUGHTON.

(Head Note.)

Page 523.	Page 523.
5. INJUNCTION—*when it should be made perpetual.*	(4) INJUNCTION: *When it should be made perpetual.*

VOLUME 42.

(Myers' Edition.)	(Callaghan's Edition.)

MEANS *vs.* MEANS.

(Head Note.)

Page 50.	Page 50.
4. AMENDMENT OF DECREE—*Notice.*	(3) AMENDMENT OF DECREE: *Notice.*

MARINE CO. *vs.* CARVER.

Page 71.	Page 71.
MR. JUSTICE LAWRENCE delivered the opinion of the court.	MR. JUSTICE LAWRENCE delivered the opinion of the court.

NOTE.—This is copied. Mr. Freeman uses that style all through his reports. Mr. Denslow adopted a

style of "Lawrence, J.," "Walker, C. J.," etc. In this case he became a little careless and copied literally, without using his pen to make his accustomed changes in Freeman.

MILLS *vs.* LOCKWOOD.
(Foot Note.)

Page 115.	Page 115.
* Reported in 39 Ill. 602.	* Reported in 39 Ill. 602.

ELIAS H. MORSE *vs.* GEORGE W. IMAN—(P. 150).

NOTE.—Denslow has transposed these names in the title of the case, thus: *George W. Inman* v. *Elias H. Morse*. But to show that he used Freeman's book in printing, turn to page 152 of Denslow's book, and at the top is copied from Freeman "*Morse* v. *Iman*."

DEWOLF *vs.* PRATT—(P. 213).

In line 11 from bottom of page, Freeman has, by mistake, used the word "or" where it should have been "for," and this error is copied in Callaghan's book.

HEACOCK *vs.* DURAND.
(Head Note.)

Page 230.	Page 230.
1. ASSIGNMENT *for the benefit of creditors; when fraudulent.*	(1) ASSIGNMENT FOR THE BENEFIT OF CREDITORS: *When void.*
2. CREDITOR'S BILL — *whether there must be a judgment and execution thereon.*	(3) CREDITOR'S BILL: *Only after execution returned unsatisfied.*
3. AMENDMENT OF BILL IN CHANCERY—*when discretionary.*	(2) AMENDMENTS IN CHANCERY: *When discretionary.*

NOTE.—That Callaghans used Myers' book to print most of this case from is shown by the facts:

1. The words "*their* creditors," in first sentence of the opinion, are "*his* creditors" in the original opinion.

2. The word "*disburse*," in third sentence of opinion, is "*discharge*" in the original opinion.

3. In the same sentence, the words "as aforesaid" are not in the original opinion.

4. In first paragraph, on page 233, *Woolworth* is *Woodward* in original.

5. The word "fees," at end of same paragraph, is not in original opinion.

6. *Pinegar*, in next to last paragraph of opinion, is *Rinegan* in original.

Callaghans have printed opinion just as Freeman printed it, with all these errors and changes.

The case was decided in 1867, but through mistake was reported by Freeman as decided in 1866. Callaghans, although printing their book twelve years later, do not discover the mistake, but copy literally.

BICKFORD *vs.* FIRST NATIONAL BANK.
(Statement of Case.)

Page 238.

This was an action of *assumpsit*, brought in the court below, *by the First National Bank of Chicago, against* Russell K. *Bickford, as* the *drawer of a certified check, which was protested for non-payment, and due notice given.* A trial resulted in a *finding and judgment for the plaintiff. The defendant appealed.*

The opinion contains a sufficient statement of *the case.*

Page 238.

Assumpsit, by the First National Bank of Chicago, against Bickford, as drawer of a certified check, which had been credited to the payee by the First National Bank, *was protested for non-payment, and due notice given* to Bickford as drawer. The *finding and judgment* were *for the plaintiff. The defendant appealed.*

The opinion states *the case.*

NOTE.—It is very evident that the statement of the case in Callaghans' book was taken from that in Freeman's, and the alteration is very slight indeed.

ROUNDS *vs.* SMITH.
(Statement of Case.)

Page 246.

Appeal from the Superior Court of Chicago, the Hon. VAN H. HIGGINS, Judge, presiding.

This was an action of assumpsit, brought in the Superior Court of Chicago, on the following instrument in writing: No. 579—Chicago, September 30, 1864. Western Marine and Fire Insurance Company: Pay L. Johnson and Co. note, or bearer, five thousand dollars, and charge account

Page 246.

Appeal from the Superior Court of Chicago; Hon. VAN H. HIGGINS, J.

This was an action of assumpsit, brought in the Superior Court of Chicago, on the following instrument in writing, viz.: No. 579—Chicago, September 30, 1864. Western Marine and Fire Insurance Company: Pay L. Johnson and Co. note, or bearer, five thousand dollars, and charge account

of S. P. Rounds, per Wheeler. Indorsed: "Good. W. S. Smith, teller." The other instrument was like the above, in all respects, except in amount, this being for three hundred and six dollars and seventy cents; also endorsed: "Good. W. S. Smith, teller."

The appellant pleaded the general issue, and with it filed the following notice:

of S. P. Rounds, per Wheeler. Indorsed: "Good. W. S. Smith, teller." And also upon one check for three hundred and six dollars and seventy cents; also endorsed: "Good. W. S. Smith, teller."

The defendant pleaded the general issue, and with it filed the following notice:

NOTE.—This is too literal copying to be accidental. It is rather a case where Mr. Denslow did not resort to his usual mode of alteration and transposition to cover his tracks.

But now turn to page 250:

A trial was had by jury, who found the issues for the plaintiff, and assessed the damages at five thousand four hundred and fifty-two dollars and fifty-two cents. A motion for a new trial was overruled, and a judgment entered for the amount so found by the jury, from which the defendant took this appeal to this court on bill of exceptions filed.

The errors assigned are, first, refusing to give instructions for defendant numbered 1, 3, 4, 7; second, refusing instructions for defendant numbered 5 and 6; third, in giving the first and second instructions for the plaintiff; fourth, in giving instructions marked "court's instructions;" fifth, in refusing to allow the defendant to prove what was the effect of certifying checks as "good" by the bank on which they are drawn; sixth, in refusing a new trial.

On the trial, the appellant proved the facts, substantially, as set forth in his notice.

A trial was had by a jury who found the issues for the plaintiff, and assessed his damages at five thousand four hundred and fifty-two dollars and fifty-two cents. Motion for new trial overruled, and a judgment entered, from which judgment defendant appeals to this court and files his bill of exceptions.

The errors assigned are, first, refusing to give instructions for *defendant numbered [251] 1, 3, 4, 7; second, refusing instructions for defendant numbered 5 and 6; third, in giving the first and second instructions for the plaintiff; fourth, in giving instruction marked "court's instruction;" fifth, in refusing to allow the defendant to prove what was the effect of certifying checks as "good" by the bank on which they are drawn; sixth, in refusing a new trial.

On the trial the defendant proved the facts substantially as set forth in his notice.

NOTE.—No amount of swearing, nor explanation, can persuade anybody that the above was not printed from Myers' book. So close is the copy that even the figures and punctuation marks are literally copied.

(Statement of Case.)

Page 256.

This was a suit *in chancery* instituted *in the court below by* Charles H. *Sutphen against* William H. W. *Cushman*, by which the complainant seeks *to recover from* an alleged mortgage, executed by him to the defendant in the form of a deed, purporting to convey an absolute estate.

On the first hearing in the court below, *the* conveyance *was* decreed *to be a mortgage, and* the complainant was allowed to redeem upon paying to the defendant a certain sum.

The complainant appealed from the decree, alleging *the* amount found to be due to the defendant *was too large. The defendant* assigned cross-errors, insisting *the transaction was not a mortgage, but a conditional sale.*

[After reciting the second trial, the report proceeds]: *It was* further *decreed that the defendant held the title to the land as security for $1,837.84, which* complainant was required to pay *on or before the 10th of September, 1865, with six per cent. interest from the tenth day of the preceding July;* and upon such payment being made, *the defendant* was required to *convey the premises to complainant.*

From this decree the defendant took this appeal, and now insists *the court erred in decreeing the conveyance to be a mortgage;* but, *if it* is to *be* regarded in that light, the account is erroneously stated in allowing but six per cent. interest, instead of ten per cent.

Page 256.

This was a bill *in chancery* filed *in the court below, by Sutphen against Cushman*, for leave *to redeem from* a deed absolute on its face, on proof that it was a mortgage.

On the first hearing, the deed *was* held *to be a mortgage,* and a decree entered naming the sum on payment of which complainant could redeem.

Both parties *appealed, the complainant* on the ground that *the* sum named *was too large*, and *the defendant* on the ground *that the transaction was not a mortgage, but a conditional sale.*

On this second hearing below, *it was* decreed *that defendant held the title to the land as security for $1,837.84,* on payment of *which on or before September 10th, 1865, with six per cent. interest from the 10th day of the preceding July, the defendant* should *convey the premises to complainant.*

From this decree the defendant appeals, assigning as error that *the court erred in decreeing the conveyance to be a mortgage,* and *if it be a* mortgage, in not decreeing ten per cent. interest instead of six.

NOTE.—It must be evident to any person, upon even a cursory glance, that Denslow's statement of the case was taken from Freeman's. In all essential particulars the language is the same; and where it is not, the court will readily perceive that Denslow was merely transposing and eliminating so as to disguise his piracy. The very fact that he did, in part, transpose Freeman's words, and made trivial changes in phraseology, is the best evidence that he made an unlawful use of Freeman's book.

FALK *vs.* PEOPLE—(P. 334).

NOTE.—In the original opinion, the word "disregarded" is used in place of the words "should disregard" in third paragraph from top of page.

Callaghans must have used Myers' book, as they reproduce Myers' page exactly, even to the italicising the preceding word "*but*."

DICKIE *vs.* CARTER.

(Statement of Case.)

Page 380.	Page 378.
The court then gave the following instructions, at the instance of the defendant.	The court then gave the following instructions, at the instance of the defendant.
Page 381.	Page 378.
To which instructions, as modified by the court, and given for defendant, the defendant excepted; and to the giving of the instructions for the plaintiff the defendant also excepted.	To which instructions, as modified by the court, given for defendant, the defendant excepted; and to the giving of the instructions for the plaintiff, the defendant excepted at the time.

NOTE.—This is pretty literal copying from Myers' book.

WALKER *vs.* SCHUM—(P. 465).

NOTE.—In the original opinion, a certified copy of which is herewith handed to the court, the word "the," in third line from bottom of page, is "its," and the words "of the decree" are not in the opinion at all.

So, instead of the words "as of," in the last line of second paragraph of p. 466, in the original is the word "at."

So, in line 16 from top of p. 467, in the original opinion the word "have" is inserted between "master" and "sold." Freeman omitted it.

In all these instances Callaghans have reprinted Freeman *verbatim*. Pretty clear evidence of copying.

VOLUME 43.

(Myers' Edition.) | (Caliaghans' Edition.)

PRELIMINARY ACT—(P. IV.)

NOTE.—This volume was published in 1869. During that year an act was passed by the General Assembly allowing eross-errors to be assigned. Mr. Myers printed the act in full, prepared with the following lines written by Mr. Freeman, the reporter:

Practice in the Supreme Court. Cross-errors allowed to be assigned in all cases.

Practice in the Supreme Court. Cross-errors allowed to be assigned in all cases.

NOTE.—It will thus be seen that Callaghans copied these editorial lines and the act *verbatim;* and the Callaghan book was published in 1878, a long time after the act in question had been repealed, and a new one materially different had been enacted as section 79 of the Practice act. (R. S. 1874, chap. 110, section 79.)

That Myers' book has been unlawfully used here will not admit of question.

TABLE OF CASES—(P. VIII.)

The Table of Cases is copied literally, with the sole exception that the abbreviations "*et al.*" in Myers' book have been stricken out in the Callaghan book.

That these pages were copied from Myers' book is proven conclusively:

1. By being a literal copy, except as to the abbreviations "*et al.*"

2. By copying Freeman's words.

On page 445 the case is *Goodrich* v. *Van Nortwick*. In Freeman's table of cases it is *Goodrich* v. *Van Nortwich*, and this error is copied by Callaghans.

3. In body of Callaghans' book, p. 432, a mistake is made in spelling *Willets* v. *Paine*, while the word "Willetts," in the table of cases, is correctly copied from Myers' book.

So, *McConnell*, p. 99, is incorrectly spelled in Callaghans' book with two *ll's*, while in table of cases it is correctly copied from Myers' book, *McConnel*.

So, a mistake in *Wetherell* is made at page 388, while it is correctly copied, in Table of Cases, *Witherell*, from Myers' book.

Usually, Mr. Denslow has made up his table of cases in the numerical order in which they appear, under the different letters of the alphabet. In this volume that rule is abandoned and Freeman copied.

These errors show, conclusively, that the four pages of Table of Cases were printed from Myers.

McDONALD *vs.* COUNTY OF MADISON.

(Head Note.)

Page 22.	Page 22.
1. ROAD TAX—*a school director not exempt.*	1. ROAD TAX: *School directors not exempt from.*
2. SAME—*road tax discharged in labor.*	2. SAME: *Discharge of in labor; notice.*

McLAIN *vs.* WATKINS.

(Head Note.)

Page 24.	Page 24.
ATTORNEY AND CLIENT—*when relation ends—subsequent acts of attorney.*	ATTORNEY AND CLIENT: *Termination of that relation; attorney's subsequent acts.*

FRINK *vs.* PEOPLE.

(Statement of Case.)

The facts sufficiently appear in the opinion of the court.	The facts appear sufficiently in the opinion.

YOUNG *vs.* FOUTE.

(Head Note.)

Page 33.	Page 33.
1. EVIDENCE—*admissions.*	1. EVIDENCE: *Admissions; their value.*
2. ADMISSIONS—*when they operate as an estoppel.*	3. ADMISSIONS: *When they operate as an estoppel.*

SANFORD *vs.* RAWLINGS.

(Statement of Case.)

Page 94.	Page 94.
The facts of the case are stated in the opinion.	The facts of the case are stated in the opinion.

Page 96.

The Commissioners of Highways of the Town of Pennsylvania, Macon County, Illinois,

v.

John Durham.

Page 96.

The Commissioners of Highways of the Town of Pennsylvania, Mason County, Illinois,

vs.

John Durham.

NOTE.—In a foot note to this case Callaghans' editor says: "This case is entered on the record, *James River et al.* v. *John Durham.*"

Notwithstanding this, he copies the incorrect title from Myers' book in full.

HOUSE *vs.* HAMILTON—(P. 187).

From a certified copy of the opinion herewith handed to the court, it appears that Freeman, in the fifth line from the top of page 187, inserted the words "*the property*," instead of the word "it," as written in the opinion, and Callaghans copied Freeman.

LAMB *vs.* RICHARDS.

(Head Note.)

Page 312.

1. REDEMPTION FROM MORTGAGE SALE—*rights of judgment creditor.*
2. FORMER DECISIONS—*Williams* v. *Tatnall, 29 Ill. 565, considered and explained.*

Page 312.

1. REDEMPTION FROM FORECLOSURE SALE: *Rights of judgment creditor.*
4. PRIOR DECISIONS: *The case of Williams* v. *Tatnall, 29 Ill. 553, considered and explained.*

TODEMIER *vs.* ASPINWALL.

(Statement of Case.)

Page 402.

The facts in this case are sufficiently stated in the opinion.

Page 402.

The facts in this case are stated in the opinion.

TOLEDO, P. & W. RY. CO. *vs.* FOSTER.

(Head Note.)

Page 415.

1. RAILROAD COMPANIES—*negligence of—for not sounding a bell or whistle at street crossings.*

In an action against a railroad company for *stock killed by one of its* locomotives, near a street crossing, while running *one of its trains* through *the corporate limits* of a town, *held*, that if *such* injury occurred before the train reached the street, and the bell *or*

Page 415.

1. RAILROAD COMPANIES: *Negligence in not sounding a bell or whistle on approaching a street crossing.*

In an action against a railroad company for *killing a cow by a* locomotive *engine*, near a street crossing, while running through *an incorporated* town; *held*, that if *the* injury occurred before the train reached the street, and

whistle *of the locomotive* was not sounded, as required by the 38*th section of the general railroad act, then, under* the statute, the company was guilty of negligence, *and* liable for injury *occasioned* thereby.

3. SAME—*when injury occurs at a place where the statute requires no signal, common law governs.*

5. NEGLIGENCE — *when not a question of fact.*

neither the bell *nor* whistle was sounding, as required by the statute, the company was guilty of *such* negligence *as would render it* liable for *the* injury *caused* thereby.

2. SAME: *When an injury occurs at a place where no signal is required by the statute, the common law governs.*

3. NEGLIGENCE *When a question of fact, and when of law.*

NOTE.—No two writers could write so near alike unless one had the work of the other before him when he wrote.

The language of the court, page 417, reads:

"But it does not appear that the bell was not ringing or the whistle sounding when she was first noticed and the train was approaching. If the *collision* occurred before the train reached the street, then, under the statute, the company was guilty of such negligence as would render it liable for the injury *which resulted* from such negligence."

Page 456.

The State of Illinois

v.

James M. Allen.

Same

v.

Charles Atkinson.

Page 456.

The State of Illinois

vs.

James M. Allen.

Same

vs.

Charles Atkinson.

NOTE.—Callaghans have here copied from Myers' book literally. Now, I turn to the certified copy of the opinion as filed and recorded, and herewith handed to the court, and the title of the case is:

STATE OF ILLINOIS

vs.

J. ATKINSON AND

J. M. ALLEN.

Again, at end of third paragraph of the opinion, where the Session Laws of 1861 are cited, Freeman added "p. 244," which is not in the opinion. Callaghans copied Freeman.

In fourth line from top of page 460, Freeman uses the character and figures "$100," while in the opinion it is written "one hundred dollars." Callaghans copy Freeman.

Again, in seventeenth line from top of p. 460, after the word "dollars," the words "an acre" occur in the opinion. Freeman struck them out, and Callaghans copy Freeman.

HANNA *vs.* RATEKIN—(P. 463).

The statement of facts in Callaghans' book is almost a literal copy from Myers', except transpositions. It was evidently taken from the report in Myers' book.

DICKSON *vs.* TODD.
(Head Note.)

Page 504.	Page 504.
1. RES ADJUDICATA—*what constitutes.*	(2) RES ADJUDICATA.
2. PURCHASERS *pendente lite—bound by the judgment or decree rendered.*	(1) PURCHASER *pendente lite; is bound by the judgment or decree.*

VOLUME 44.

(Myers' Edition.)	(Callaghans' Edition.)

MILLS *vs.* GRAVES.
(Head Note.)

Page 50.	Page 50.
EJECTMENT—*conveyance by plaintiff pending suit.*	EJECTMENT: *Effect of conveyance by plaintiff pending the action.*

CHICAGO & N. W. RY. CO, *vs.* DEMENT.
(Head Note.)

Page 74.	Page 74.
1. NEW TRIAL—*verdict against the evidence.*	NEW TRIAL: *Verdict against the evidence.*
3. INSTRUCTIONS—*omissions therein obviated by the proof.*	INSTRUCTIONS: *Omissions in supplied by the evidence.*

TILLEY *vs.* SPALDING.

Page 80.

NEW TRIAL—*Verdict against the evidence.*

Page 50.

NEW TRIAL: *Verdict contrary to the evidence.*

MAHONY *vs.* DAVIS.

(Statement of Case.)

Page 279.

This was an action in assumpsit, *brought in the court below* by *the* defendants in error against *the* plaintiff in error, *to recover* for a quantity of cheese, alleged to have been sold *to him* under a contract made *with him* in Cook County. The defendant resided in LaSalle County, *and was sued* in Cook County, and process *sent to and* served *upon him* in LaSalle County. The question, *therefore, of* the jurisdiction of the court below *over the defendant, is the sole question presented.*

Page 279.

Assumpsit, by defendants in error against plaintiff in error, for the price of a quantity of cheese, alleged to have been sold by plaintiff to defendant, under a contract made at Chicago, in Cook County. The defendants' residence *was in* LaSalle County, but the suit was commenced in Cook County, and the process served on the defendant in LaSalle County. The only question is as to the jurisdiction of the court below.

NOTE.—The statement in the Callaghan book is manifestly taken from Myers' volume. The paragraph is divided into exactly the same number of sentences, and the identical idea is conveyed in each corresponding sentence.

If the court will take the statement in Myers' book and his pen, he will see how easy it was for Mr. Denslow to change it as he did change it. The changes made were merely verbal, the principal part of Freeman's language being retained.

HOY *vs.* HOY—(P. 472).

In the certified copy of the opinion of the court, herewith handed to the court, a sentence on page 2 reads thus:

"In the case under consideration the sum is *specific* and certain," etc.

Freeman printed it thus:

"In the case under consideration the sum is *specified* and certain," etc., and Callaghans copied Freeman.

KILEY *vs.* BREWSTER—(P. 188).

The first line of the second paragraph from the bottom of page 188, reading "*Next*, what was the intention," etc., reads "*Not* what was the intention," etc., in the opinion, as appears from the certified copy herewith handed to the court, and Callaghan copied Freeman.

LEWIS *vs.* PEOPLE—(P. 454).

The words "*they may*," in line 18 from top of page 455, were substituted by Mr. Freeman for the word "to" in the opinion.

So, in line 12 from top of page 455, the word "*the*" in the opinion was changed to "this" by Mr. Freeman.

In line 13 of same page, after the words "*The People*," the words "*not reported*" occur in the opinion. Freeman struck them out and inserted "38 Ill. 514."

In each instance Callaghans followed Freeman, and not the official opinion.

Then, in the conclusion of the opinion, the words "and the cause remanded," which occur both in the original opinion and in Freeman, are omitted in Callaghans' book.

I hand up a certified copy of opinion, which shows all these points.

VOLUME 45.

(Myers Edition.) (Callaghans' Edition.)

LATHAM *vs.* SMITH.

(Statement of Case.)

Page 29.

This is *the* same *case* referred to in the *preceding* opinion, which upon being remanded, was *again tried in the court below*, the trial resulting as before, in favor of *the defendant*, and the plaintiff *appealed to this court*. The principal question arising on the record is *whether* the *Congress* has the power *to require* that an *instrument* shall be *stamped, as a condition precedent to its admissibility in evidence in a State court.*

Page 29.

The case reported in the pages immediately *preceding*, having been *again tried in the court below*, and verdict and judgment having again been rendered for the defendant, was again brought to *this court by appeal, the question* for determination being *whether Congress* is authorized to enact a law *requiring an instrument to be stamped, as a condition precedent to its admissibility in evidence in a State court.*

NOTE.—It must be apparent, upon a mere cursory view, that Callaghans' editor prepared his statement from Freeman's. By taking a pencil the court will see how perfectly easy it is to make the changes, so as to produce the statement in the Callaghan book.

I hand up a certified copy of the opinion, which shows that the Judges did not prepare statement of facts. Had the statement been prepared by the court, the same statement would have appeared in both of these books. The statement being Mr. Freeman's work, it became necessary for Mr. Ewell or Mr. Denslow to mutilate it, so as to mislead the court.

It is evident, on the face of the report, that Myers' volume was the only source from which Callaghans' editors reprinted this case.

STONER *vs.* SHUGART.

(Statement of Case.)

Page 77.

The facts are sufficiently stated in the opinion.

Page 77.

The case is sufficiently stated in the opinion.

ALDERSON *vs.* ENNOR.

(Head Note.)

Page 128.

2. SAME—*for money had and received; when may be bought.*

An action for money had an received may be maintained, whenever a party has obtained money from another, which in equity and good conscience he ought not to retain, etc.

Page 12[illegible].

2. SAME: *For money had and received.*

An action for money had and received may be maintained, whenever the defendant has obtained money of the plaintiff, which in equity and good conscience he has no right to retain.

NOTE.—Here is a palpable case of piracy.

Compare, also, No. 4 of the head note in each volume. The difference arises mainly from transposition by Callaghans' editor.

MERWIN *vs.* CITY OF CHICAGO.

(Head Note.)

Page 134.

4. Where a municipal corporation is summoned as a garnishee, it may be discharged on mere motion, and without answer, at any time after process ceased.

Page 134.

2. A municipal corporation summoned as a garnishee, may properly be discharged on motion, without being or having been required to answer.

NOTE.—It is perfectly easy to see how the alterations were made by Callaghan's editor.

BOYNTON *vs.* WICKER—(P. 137).

(Statement of Case.)

All that is necessary is to compare the two statements of facts, to see that all that Callaghans' editor did was to change a few words and make a few transpositions. Other than this the two statements are identical. I do not quote it, on account of its length. I respectfully ask the court to read them.

WINSLOW *vs.* NEWLAN.

(Head Note.)

Page 145.

2. The refusal of the court to dismiss a suit at the instance of a co-plaintiff, cannot be assigned as error by the defendants.

Page 145.

2. Where the court refused the motion of a co-plaintiff to dismiss the suit, this cannot be assigned as error by the defendant.

NOTE.—It must be apparent from a mere comparison of these notes, that Callaghans' editor used Freeman's

note. More especially is this so when I state that the court did *not* decide the point here asserted by both reporters. This will be perfectly apparent by reading the first six lines of the opinion.

FANT *vs.* THE PEOPLE.

(Head Note.)

Page 260.

4. JURISDICTION—*concurrent under the State laws and under city ordinances.*

The fact, that under the charter of a city an offense had been prohibited by ordinance, and that the accused could have been prosecuted for a violation of the ordinance, forms no defense to a prosecution under the State laws.

Page 260.

4. SAME: *Concurrent jurisdiction over an offense in State and municipal authorities.*

The fact that, under the charter of a city, an offense has been prohibited by ordinance, and that the accused could have been prosecuted for a violation of the ordinance ( ) forms no defense to a prosecution by indictment under the State law.

NOTE.—The language of the opinion on this point is, "The fact, then, that under the charter of the city of Joliet, this offense had been prohibited by ordinance, and that the accused could have been prosecuted for a violation of the ordinance, forms no defense to this proceeding." (P. 263.)

While this note is, to a certain extent, copied from the opinion, comparison shows that Callaghans' editor has copied Freeman much closer than he has the opinion.

HAGUE *vs.* PORTER.

(Head Notes.)

Page 318.

1. EJECTMENT — *plaintiff must recover on the strength of his own title.*

2. CLERKS OF COUNTY COURTS—*successors of the clerks of the County Commissioners' Courts.*

3. SAME—*power to appoint deputies.*

4. SAME — *certificates of magistracy.*

Page 318.

1. EJECTMENT: *Plaintiff must recover, if at all, on the strength of his own title.*

2. CLERKS OF COUNTY COURTS: *Successors of Clerks of County Commissioners' Courts.*

3. SAME: *May appoint deputies.*

4. SAME: *May make certificates of magistracy.*

Perfectly plain cases of piracy.

HALE *vs.* TOWNE.

(Head Note.)

Page 493.

1. CHANCERY—*pleading in. Allegations and proofs must correspond.*

2. SAME—*decree in — must conform to prayer of the bill.*

3. JUDICIAL SALES—*the power of sale conferred in a mortgage must be strictly pursued.*

Page 493.

1. PLEADINGS AND EVIDENCE: *Allegations and proofs must correspond.*

2. DECREE: *Must conform to prayer.*

3. MORTGAGES: *Power of sale in, must be strictly pursued.*

NOTE.—Unquestionably a clear case of piracy.

VOLUME 46.

(Myers Edition.) (Callaghans' Edition.

RAY *vs.* BULLOCK.

(Head Note.)

Page 64.

NEW TRIAL—*verdict against the evidence.*

Page 64.

NEW TRIAL: *Verdict against evidence.*

SMITH *vs.* BROWN.

(Head Note.

Page 1 6.

NEW TRIAL—*when will not be granted.*

Appeal from the Superior Court of Chicago.

Page 1 6.

NEW TRIAL: *When not granted.*

Appeal from Superior Court of Chicago.

ELSTON *vs.* KENNICOTT.

Page 207.

This case was again brought before this court, at the September term, 1868, upon a petition for re-hearing, presented by the counsel for appellees, on the ground that their defense as to the east third of the lot in controversy, although not maintainable under the limitations act of 1839, was so under that of 1835. In denying the petition the court delivered the following additional opinion :

Page 207.

This case was again brought before this court, at the September term, 1863, upon a petition for re-hearing, presented by the counsel for appellees, on the ground that their defense as to the east third of the lot in controversy, although not maintainable under the limitation act of 1839, was so under that of 1835. In denying the petition the court delivered the following additional opinion :

NOTE.—This is a literal copy of Freeman's editorial note. The piracy is incontestible in this case.

LYON *vs.* ROBBINS.

(Head Note.)

5. JUDGMENTS—*not liens in the order of their rendition upon the property fraudulently conveyed before they were obtained.*

2. JUDGMENTS: *Not liens in the order of their dates, on property fraudulently conveyed before they were rendered.*

NOTE.—The piracy here is obvious to the most casual observer.

PALMER *vs.* BOARD OF SUPERVISORS, ETC.

(Foot Note.)

Page 449.
*To be reported in 47th Illinois.

Page 449.
To be reported in 47th Illinois.

NOTE.—This is an unquestionable case of piracy, because at the time Callaghans' book was published, the 47th Illinois had already been published *ten* years.

GRANT *vs.* GREEN—(P. 470).

After the words "County Court," in line 5 from top of page 470, the words "of Jefferson county" occur in the opinion. Mr. Freeman, by mistake, omitted them, and Callaghans copy the mistake.

(See certified copy of opinion herewith handed to the court.)

CITY OF BLOOMINGTON *vs.* WAHL—(P. 492.)

In line 8 from bottom of page 492, after *Rumpff*, the words "decided at the September Term, 1867," occur in the opinion. (See certified copy herewith produced.) Mr. Freeman changed them to 45th Ill. 90, and Callaghans copied Freeman.

NOTE.—The defendants advertised in their catalogues, circulars, and price list calendars of their *own publications*, thus:

"Freeman's Reports, 32 to 46 Ill., 1863 to 1868,"

Adding that they "are re-reported and annotated,' that "the editorial work has been done by Hon. J. M. Bailey, Levi North, Prof. V. B. Denslow, and M. D. Ewell, of the Union College of Law, Chicago. (See circular list of *their own publications* introduced, which should appear with the deposition of B. Callaghan.)

If they had truthfully "re-reported," why did they not advertise them as Bailey's Reports, Denslow's Reports, etc., and not Freeman's books, published by Myers?

But a year after the supplemental bill was filed, they cunningly pasted a slip covering that line in their *Catalogue;* but they could not recall the Circulars distributed during the years 1877 to 1882.

IN THE

Supreme Court of the United States.

OF OCTOBER TERM, A. D. 1888.

BERNARD CALLAGHAN ET AL.,
Appellants,
vs.
EUGENE B. MYERS,
Appellee.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

APPELLANTS' BRIEF.

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IN THE

Supreme Court of the United States.

OF OCTOBER TERM, A. D. 1888.

BERNARD CALLAGHAN ET AL.,
Appellants,
vs.
EUGENE B. MYERS,
Appellee.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit court of the United States for the Northern district of Illinois, whereby appellants were adjudged to have infringed the copyright claimed by appellee in volumes 32 to 46, inclusive, of the reports of the Supreme court of the State of Illinois, and awarding damages for such infringement.

December 17, 1877, the appellee, Eugene B. Myers, filed his original bill of complaint in the Circuit court against appellants, who constituted the firm of Callaghan & Company, law book sellers and publishers, together with Marshall D. Ewell and V. B. Denslow as defendants. The bill avers (Record, page 2) that from August 1,

1865, to January 1, 1868, Myers was engaged in the business of publishing law books in Chicago, in partnership with Horace P. Chandler, under the firm name of E. B. Myers & Chandler; that during that period the firm became the proprietors of the reports of the Supreme court of Illinois, reported by Norman L. Freeman, including volumes 32 to 38, both inclusive, and, as such proprietors, desiring to secure a copyright upon each of the volumes as published, they deposited in the office of the clerk of the District court of the United States for the Northern district of Illinois a printed copy of the title of each volume in advance of publication, and within three months after the publication of each volume they deposited in the office of the clerk a copy of the volume. The dates of the deposit of the titles and of the publication of the different volumes are not stated in the bill, but the date of the deposit of the printed copy, after publication, is averred in each instance. The bill avers that the volumes were prepared by Norman L. Freeman, who was the official reporter of the court, each of them containing head notes and other original matter prepared by the reporter, many of the cases containing statements of fact and other matter prepared by him, and each volume containing a table of the cases decided; that the firm of E. B. Myers & Chandler purchased from Freeman all his proprietary rights in the books, paying him a large consideration therefor, he agreeing that the firm should have the copyright of the volumes, the publishers dividing the decisions and accompanying matter into volumes and arranging the paging of the volumes. It is alleged (page 5) that on June 13, 1868, Chandler sold and assigned to Myers all his interest in the books and copyrights by a written assignment duly acknowledged and

recorded, whereby Myers became the sole proprietor of the copyrights of volumes 32 to 38, inclusive. It is also averred that between June, 1868, and October, 1869, Myers was the proprietor of volumes 39 to 46, inclusive, of the Illinois Reports; that before publication he deposited with the clerk of the District court a printed copy of the title of each volume, and after publication deposited in the clerk's office a copy of each volume. The dates of the deposit of the title pages and of the publication are not given, but the dates of the deposit of the printed copy with the clerk are alleged in each instance. It is alleged (page 8) that Myers purchased from Freeman all his proprietary rights in each of the volumes 39 to 46, inclusive, paying him a large consideration therefor, Freeman agreeing that Myers should have the copyright. It is alleged that in July, 1877, Myers reprinted volumes 37 and 38. The bill claims the exclusive right to the arrangement of each of the volumes, to the head notes, arrangement of the pages, the division of the opinions into separate volumes, tables of cases cited and decided, the arrangement of the decisions with the accompanying matter, tables of cases reported and indexes, and the exclusive right to all of the books, except the matter contained in the opinions of the judges.

The bill charges that defendants, with full knowledge of complainant's exclusive right, attempted to buy the same of complainant, but refused to pay the price asked by him, and thereupon proceeded to reprint and publish volumes 32 to 38, inclusive, preparing their books from those of complainant, without procuring the matter from the original sources, making only colorable changes, and that defendants' volumes are imitations of complainant's and piracies upon his copyrights. The bill also charges

that defendants threaten to publish volumes 39 to 46, inclusive. The bill prays (page 10) an injunction against publication, a forfeiture of the infringing volumes, an accounting as to the number sold and damages for the unlawful publication.

Answers were filed by the defendants Ewell (page 14) and Denslow (page 26), disclaiming any interest in the publication. It is conceded that Ewell and Denslow were merely employed as editors, having no pecuniary interest in the publication, other than their compensation for editorial services, and that appellants, who constitute the firm of Callaghan & Company, are the sole proprietors of the alleged infringing volumes.

The appellants, Callaghan & Company (page 15), filed a demurrer to so much of the bill as prayed a discovery and an accounting, upon the ground that as appellee sought by his bill to enforce the penalties and forfeitures prescribed in the act of Congress concerning copyrights, they could not be compelled to make any discovery which might subject them to such penalties and forfeitures. A hearing was had upon this demurrer before Mr. Justice Harlan, and July 1, 1878 (page 28), he entered an order sustaining the demurrer and overruling complainant's exceptions to the answer of the defendant Ewell, disclaiming any interest in the volumes in question.

February 13, 1878, Callaghan & Company filed their answer to the original bill (page 16). The answer puts complainant upon strict proof as to the proprietorship by the firm of E. B. Myers and Chandler of volumes 32 to 38. It admits that they filed a printed copy of the title of volume 32 before publication, and that on January 13, 1866, they deposited a printed copy of the book with the clerk, but denies that the deposit was made within

three months after publication, and avers that it was not made until after a period of more than three months had elapsed from the date of publication. It denies that the firm deposited a printed copy of the title of volume 34 with the clerk before publication. As to volumes 33 and 35 to 38, inclusive, the answer puts complainant upon strict proof as to the deposit of the titles in advance of publication, and the printed copies within three months after publication. The answer calls for strict proof as to the purchase, by the firm of E. B. Myers & Chandler, of Freeman's interest in the volumes, and as to the sale and assignment by Chandler of his interest in the copyright. As to volumes 39 to 46 inclusive, the answer puts complainant upon strict proof as to his proprietorship and the filing of the printed copies of the title pages in advance of publication, and the deposit of the printed copies thereafter, and the purchase from Freeman of his interest in the volumes.

The answer denies the exclusive right of the complainant to publish any of the books, for the reason that they are common and public property, forming part of the law of the State of Illinois, and as such not susceptible of copyright, or in any manner literary property in which a private citizen can have a monopoly under the act of Congress regulating copyrights. It avers that Freeman's labor upon the volumes was done by him in his official character as reporter of the decisions of the Supreme court of Illinois, a public office then existing under the laws of the state, to which Freeman had been duly appointed, and that the result of his labor as such reporter was common and public property, not susceptible of copyright, or of private literary ownership, within the meaning of the act of Congress regulating copyrights.

The answer denies the exclusive right claimed in the arrangement of the volumes and pages, the arrangement of the decisions and accompanying matter, either as an entirety or as to any elements thereof. It admits that negotiations were had with complainant concerning the purchase of his interest in volumes 39 to 46, inclusive, consisting of the stereotype plates and printed stock of these volumes, but that no price or value was attached by either party to the pretended copyright in volumes 32 to 46, which was intended to be "thrown in," if such sale were consummated.

The answer admits the republication, by defendants, of volumes 32 to 38, using the opinions of the Supreme court, as published by complainant, but avers that they have been corrected in various errors, and denies that defendants' volumes have been prepared from complainant's, except in so far as complainant's books are free to the use of all persons, and denies the making of colorable changes, averring that the statements of fact and syllabi in defendants' volumes are wholly original, and where an apparent resemblance occurs, it is due to the fact that in both cases they have been drawn from the opinions of the court, and denies any piracy or infringement. The answer admits that defendants have had under consideration the republication of volumes 39 to 46, but denies that they have been published.

The answer further alleges that for many years prior to the filing of the bill complainant had wholly abandoned volumes 32 to 38; that his stereotype plates and stock of these volumes were destroyed in October, 1871, and none of the volumes were ever produced by him until July or August, 1877, when he reprinted volumes 37 and 38; that prior to that time he had repeatedly announced

to defendants, and to the legal profession, that he should never reproduce these volumes; that defendants had notified him of their intention to republish the volumes, long prior to such republication, and from time to time, as the work progressed, during 1877, they notified him of the progress of the work, and negotiations were had with him during that summer for an exchange of such volumes, so being republished, for his volumes 39 to 46; during all which period, and down to the filing of his bill of complaint, he never in any manner objected to such republilication, but always appeared to acquiesce therein, and encouraged defendants to proceed, whereby they were led to believe that such republication was with his full and complete consent. They therefore insist that he is estopped by reason of his conduct from the relief claimed in his bill.

The case was referred to a master to take proofs upon complainant's motion for a preliminary injunction, and the master reported (page 28) against the granting of such injunction. The original bill, as to volumes 32 to 38, came on for final hearing before Judge Drummond, and on February 10, 1881 (page 31), he rendered an opinion finding defendants guilty of infringement, as to these volumes, and on the same day (page 37) a decree was entered in accordance with his opinion, finding complainant to be the owner of the copyright of volumes 32 to 38; that defendants had infringed these volumes, and awarding an injunction and a reference to Henry W. Bishop, master, for an accounting. The decree also provides (page 38), "That the defendants last named (the firm of Callaghan & Company) may be examined in regard thereto, and that they may be required to produce their account books and papers." By the same decree

leave was given to complainant to file a supplemental bill as to volumes 39 to 46.

February 13, 1881, Myers filed his supplemental bill, charging that defendants, since the filing of the original bill, had published and sold volumes 39 to 46, inclusive, except volume 40; that in making such volumes they had used complainant's books without resorting to the records of the Supreme court, copying complainant's matter, making only colorable changes therein, and that defendants' volumes were mere imitations of and piracies upon complainant's. The supplemental bill prayed an injunction and damages.

June 22, 1881 (page 50), Callaghan and Company filed their answer to the supplemental bill, admitting the publication by them of volumes 39 to 46, except volume 40, denying their intention to publish volume 40, and denying that the volumes so published by them were copied from complainant's. The answer admits that these volumes embrace the opinions of the court, as taken from the volumes reported by Freeman, and avers that they were in all cases carefully compared with the original opinions of the court on file, and corrected, and, except as to the opinions, denies that defendants have used complainant's books or copied therefrom, and avers that the matter was obtained from the original records of the Supreme court of Illinois, at Springfield, Mt. Vernon and Ottawa, and was arranged, compiled, prepared and edited wholly by the original labor of their editors employed for that purpose, and avers that defendants' volumes are new and original productions, with new and original tables of cases, head-notes, statements of fact, abstracts of briefs of counsel, corrected opinions, foot-notes and indexes.

The defendants Ewell and Denslow (page 53) an-

swered the supplemental bill, disclaiming all interest in the publication of the volumes in question.

After a hearing upon the merits of the supplemental bill, and upon December 7, 1883, (page 62) Judge Drummond rendered an opinion finding defendants guilty of infringement as to volumes 39 to 46, excepting volume 40, and on March 3, 1884, (page 70) a decree was entered, in accordance with this opinion, finding that the complainant was the owner of the copyright in volumes 39 to 46; "that the said defendants have in some particulars infringed the said copyrights of the Illinois reports," and directing a reference to John I. Bennett, master, for an accounting as to the profits, defendants being required to produce before the master their books of account and papers, relating to the publication and sale of the volumes.

The history of defendants' publication of the volumes in question, may be summarized as follows: In the year 1877 Myers and the firm of Callaghan and Company were, and for many years prior thereto had been, rival publishers of, and dealers in, law books in the city of Chicago. Myers claimed the ownership of the copyrights of volumes 32 to 46 of the Illinois reports (page 104). Appellants claimed the copyright of volumes 1 to 31, and the printed stock of such as were in existence, (page 131). Mr. Freeman, the reporter, owned from volume 47 to the end of the series. Appellee's stereotype plates of volumes 32 to 38 were burned in the great Chicago fire, of October, 1871, and from that time down to the publication of appellants' edition of these volumes, they were out of print and very scarce, and could only be had at second hand at large prices. Appellee had repeatedly refused to republish them, upon the ground that there was no profit in

such republication, (pages 133, 270 to 273, 284). Appellee had a few copies of some of these volumes in a bindery at Albany, when the fire of October, 1871, occurred, which were all of his printed stock saved from that fire. In February, 1877, appellants, under contract with Freeman, acquired control of his volumes from 47 to the end of the series, (page 131), and were desirous of putting complete sets of Illinois reports upon the market. As early as the spring or summer of 1876, interviews were had between the two houses, in which appellants advised Myers of their intention to republish volumes 32 to 38, he stating, (page 133) that he would not republish them. These interviews continued during the year 1876 and as late as June, 1877. Various propositions were considered looking toward the sale of Myers' printed stock of volumes 39 to 46, and the interest which he claimed in volumes 32 to 46, but no sale was effected.

February 24, 1877, (pages 135 and 169) Callaghan & Company caused an advertisement to be published conspicuously in the Chicago Legal News, announcing their republication of volumes 19 to 38, the advertisement announcing that the volumes were then in press, and a circular, containing similar information, was sent to the profession throughout the state. They immediately began the printing of the volumes, which were completed and published in the following order (page 141), during the year 1877: May 31, volume 32; July 14, volume 33; August 24, volume 37; August 28, volume 35; September 15, volume 34; October 6, volume 38; November 19, volume 36. Copies of each of these volumes were procured by Myers as fast as they were published (pages 115 and 141). As late as June, 1877, an interview was had between the parties, at which further efforts were made for

the purchase of appellee's interest, but without avail. At this interview Myers was apprised by Callaghan and Company (page 115) that they were reprinting volumes 32 to 38, and he had already seen and procured volume 32, which was then published, and had seen the circular advertisement of Callaghan and Company (page 110) announcing their reprint as early as February or March, 1877. Appellants testify that at the June interview, as at previous interviews (pages 137, 138, 140), Myers proposed to sell to them his volumes 39 to 46, at the same price at which they would furnish him their reprints, including volumes 1 to 38, which they declined. It is claimed by Myers that in his conversations with Callaghan and Company, concerning an exchange, volumes 32 to 38 were never mentioned (page 362). During all this period the places of business of the two houses, in Chicago, were in close proximity, and the firms were in constant, and sometimes daily, communication in the course of their business, each procuring books from the other, as the demands of their customers might require. Both Myers and his employes frequently inquired of appellants as to the condition of their reprinted volumes, and were constantly advised of their condition from time to time, as the work progressed during the summer of 1877 (pages 140, 197, 198, 288 and 291).

About March, 1877, Myers issued a circular to the book trade (pages 309 and 310), giving a list of his publications, including the following:

"Illinois Reports, volumes 32–38; per vol., $6.00."

About the same time he issued a circular to the profession (pages 329 and 330), in which he includes "Illinois reports (19 to 38 inclusive) reprinting." It is claimed by Myers that these were intended as announce-

ments of the republication by him of volumes 32 to 38. It is contended by appellants that these circulars merely refer to their own republication of the volumes in question, and that they indicate Myers' approval of such republication. These circulars were never seen by appellants, or by their employes, until after the filing of the original bill. Myers did, in fact, republish volumes 37 and 38 in the summer of 1877, and the appearance of the volumes was the first information received by appellants of any intention upon the part of Myers to republish.

During the entire period in controversy, and down to the time of the filing of the original bill of complaint, December 17, 1877, appellants and their employes all testify that they never heard any objection or complaint of any nature made by Myers touching their republication of volumes 32 to 38. Bernard Callaghan testifies (page 175), that at the June interview of 1877 Myers stated "that he did not care what they did with 32 to 38, inclusive; that what he cared about was the volumes of which he had stock and stereotype plates of, namely, 39 to 46." This is denied by Myers (page 362.) Andrew P. Callahan testifies (page 144) that he never heard any objection from any source, directly or indirectly, to their reprinting volumes 32 to 38 until the filing of the bill, and that the effect produced upon his mind by his various interviews and conversations with Myers as to their publication of volumes 32 to 38 was that he was induced to believe that Myers wanted it done. George W. Beck, an employe of Callaghan & Company, testifies (page 288) that in an interview with Myers in May, 1877, the latter stated that if Callaghan & Company reprinted 39 to 46 he would "put a rod

in pickle for them," but that he made no objection to the reprinting of volumes 32 to 38. George L. Myers, a son of appellee, testifies that he overheard a conversation between his father and one of appellants, in which his father stated (page 342) that if he (Callaghan) "infringed on his rights he would make it hot for him."

December 1, 1877, two weeks after the last of appellants' volumes 32 to 38 had appeared, and sixteen days before the filing of the bill, Myers wrote the following letter to Callaghan and Company:

"CHICAGO, December 1, 1877.

"*Messrs. Callaghan and Company.*

"GENTLEMEN: I have your note of this date complaining because I charge you $5 per volume for my reprints of the Illinois Reports. My best answer seems to be that you did a month ago, without notice, advance your price to me to $7.50 per volume on Vols. 1 (Breese) to 38, inclusive. You also did, without notice or cause, advance your charge to full retail price for Moore's Justice.

"I have no right to question your mode of transacting your business, nor will I permit you to question mine.

"Resp'y,

"E. B. MYERS."

No proof was offered of the purchase by Myers and Chandler from Freeman, the reporter, of his proprietary rights in volumes 32 to 38, as alleged in the bill, or of any agreement between Freeman and the firm, concerning the copyright of the volumes, or of the alleged sale and assignment by Chandler to Myers of his interest in volumes 32 to 38. No proof was offered in support of the allegations of the bill, concerning the purchase by Myers from Freeman of the proprietary interest of the latter in volumes 39 to 46.

No proof was offered as to the date of the publication of any of the original volumes 32 to 46. For the purpose of proving the date of filing the titles of the respective volumes, appellee offered in evidence certified copies from the records of the District court of the United States for the Northern District of Illinois, signed by William H. Bradley, clerk of that court, and attested with the seal of the court, showing the deposit in his office of the titles of the different volumes, (pages 497 to 507.) At the bottom of the certificate concerning the filing of the title of volume 32 (page 498), after the clerk's certificate and seal of the court, the following memorandum appears:

"Work deposited Jan'y 17, 1866.

"WM. H. BRADLEY,
"*Cl'k.*"

Similar memoranda appear in the same place at the bottom of each of the other certificates, concerning the filing of the titles. None of these memoranda are certified by the clerk, or attested by his official seal. No proof was offered as to the genuineness of the signatures to these memoranda, and aside from the memoranda themselves, no proof whatever was offered as to the dates of the deposit with the clerk of the printed volumes. To the introduction of each of these memoranda, purporting to show the date when the volumes were deposited, appellants objected (page 497) on the ground that they constituted no part of the clerk's certificate, but were mere anonymous statements, with no proof as to when or by whom they were made, and that they were wholly incompetent to show the date of such deposit. This objection was overruled by the court, to which ruling appellants excepted.

Appellants also objected to the introduction of the cer-

tificate to volume 34 (page 497), upon the ground that, even if the memorandum at the bottom of the paper was competent to show the date when the volume was deposited, then such deposit was made at the same time with the deposit of the printed title, viz: October 23, 1866, and that it did not, therefore, appear that the title was filed in advance of publication, and the work deposited after publication, as required by the act of Congress, and that the paper was therefore wholly incompetent. This objection was overruled by the court, and appellants excepted.

Appellants also objected to the introduction of the certificate as to volume 35 (page 497), upon the ground that it purported to show that the title was deposited January 28, 1867, while the printed notice on the back of the title page of volume 35, is as follows: "Entered according to act of Congress in the year 1866." It was therefore objected that there was a variance between the date of entry upon the certificate and the date as so printed in the volume, and that the paper was incompetent. This objection was also overruled by the court, to which ruling appellants excepted.

The memorandum appended to the certificate as to volume 32, purporting to show that the work was deposited with the clerk January 17, 1866, for the purpose of showing that even if such memorandum were competent proof of the date of the deposit, it was still more than three months after the date of publication, appellants offered in evidence certified copies from the Auditor of Public Accounts and from the Secretary of State of the State of Illinois (page 510), showing the sale by Norman L. Freeman, the reporter, to the state of 553 copies of volume 32, and payment therefor October 2, 1865. The

certificate concerning volume 34 (page 499) purporting to show the deposit of the title with the clerk October 23, 1866, and the memorandum at the bottom of the certificate, purporting to show the deposit of the book on the same day, appellants, for the purpose of proving that this volume was already published on that date, offered in evidence certificates from the Auditor of Public Accounts and from the Secretary of State of the State of Illinois, showing a sale by Freeman, the reporter, to the state upon that date of 553 copies of volume 34, and payment for the same. To the introduction of these certificates as to volumes 32 and 34 appellee objected upon the ground that they constituted no evidence of the publication of either of the volumes, and were wholly incompetent. The objection was sustained, and appellants excepted.

The manner in which the volumes of the Callaghan edition were prepared was as follows: In the preparation of volumes 32 to 38 no use was made by the editors employed for that purpose, of the original files and records of the Supreme court, the material used, except as to foot notes which were added by the editors, being taken entirely from the original Freeman edition. Volumes 32 to 36 were edited by M. D. Ewell, and volumes 37 and 38 by V. B. Denslow. Mr. Ewell testifies (page 206 *et seq.*) that he first read the opinions of the court to get at the point decided, and then wrote the head notes in his own language, except where the court had formulated the point decided, when, if in suitable form, he adopted the language of the court, and that he did not in any instance copy Freeman's head-notes, or use them in any manner, but arrived at his conclusions independently from the reading of the cases, although he saw and read Freeman's head-notes. In preparing the statements of fact,

he endeavored to use his own language, obtaining his information from the Freeman edition, but not copying the language used from Freeman, unless in cases where the latter had quoted from documents in the record, in which cases he used such documents, or copies, and in some cases he obtained his information entirely from prior reports of the same cases, in earlier volumes. In some instances he found the reporter's statement of facts different from that contained in the opinion of the court, and in such instances he took the statement of the court in preference. Many errors of citation and verbal inaccuracies were discovered in the opinions, which he corrected. He prepared his indexes by taking the proof of his own head-notes, or syllabi, cutting them up and classifying them without looking at the original edition. He prepared many foot-notes, containing references to other decisions, deriving his information as to such notes entirely from his own independent investigation of the digests and reports. He testifies that the apparent resemblances which have been pointed out between his head-notes and those of Freeman's edition, are in every instance due to the fact that each used the language of the court in preparing the head-notes in question. Aside from his foot notes, he had no other material for the preparation of his volumes, than the original edition of the reporter. In many cases he omitted statements of fact entirely, which were contained in the original edition, regarding the facts as sufficiently stated in the opinion of the court. Volumes 37 and 38 were prepared by Mr. Denslow in substantially the same manner, as appears by his testimony (page 220 *et seq*).

It is claimed by appellants that all the matter contained in volumes 39 to 46 of their edition, aside from the

opinions of the court, was taken from the original records and files of the Supreme court in the three grand divisions, at Ottawa, Springfield and Mt. Vernon. Volume 39 was originally prepared by Joseph M. Bailey, but only his head-notes and foot-notes were used in the volume as published. These were, he testifies (page 395 *et seq.*), prepared by him entirely from the opinions, without using Freeman's head-notes. The statements of fact and briefs of counsel, in this volume, were not prepared by Bailey, but were the work of Mr. Denslow from the original records. Levi J. North had prepared the head-notes and foot-notes for volume 43, a part of which were used by Mr. Denslow in completing that volume (page 406). Volumes 44 and 45 were originally prepared by Mr. Ewell, but only his head-notes, foot-notes and indexes were actually used in the volumes as published. These, he testifies (page 400), were made wholly as the result of his original investigation, without copying or using any of Freeman's matter, although he did not in person go to the records of the Supreme court for the statements of fact, briefs of counsel and other matter, which was afterwards prepared and inserted by Mr. Denslow from the records, as will be hereafter shown.

Aside from the work thus done upon volumes 39, 43, 44 and 45 by Bailey, North and Ewell, none of which was published other than their head-notes and foot-notes, all the editorial work upon volumes 39 to 46 of the Callaghan edition, was done by Mr. Denslow. He testifies (pages 403 to 444), that the editorial work on volumes 41, 42 and 46 was entirely his own, and that he retained most of the head-notes and foot-notes which had been prepared by the other editors above named upon volumes 39, 43, 44 and 45. All other matter, including the title of

the case, the statement of the court below in which the case originated, the name of the judge of the court below, the statement of facts, the names of counsel and their briefs, he obtained from the records and files of the Supreme court in the different divisions. The opinions were taken from the Freeman volumes, but were carefully compared with the original opinions of the court, as filed or recorded, and corrected by these manuscript opinions, many corrections being made (page 404). He made entirely new statements of fact in all cases, and prepared his indexes by taking the head-notes of his volumes and arranging them under such heads as he thought proper (page 405). Most of the head-notes which had been prepared by Mr. North, for volume 43, he rejected and prepared new head-notes of his own. In some cases, where Freeman had introduced into his statements of fact long copies of documents from the record, he took these from Freeman's edition, and, after correcting them by comparison with the original, made use of them (page 408). This was done in about seventeen cases in all in the seven volumes in question (page 440). In some cases he was permitted by the clerk of the court to cut such documents from the copies of the abstracts on file. In some cases he was furnished by the clerk with copies of the briefs upon file, with the privilege of cutting them, and, in other cases, where not permitted this privilege, he condensed the briefs of counsel from the written or printed briefs, writing out the manuscript for the printer (pages 408 and 409). He used no portion of Mr. Freeman's matter in the preparation of the briefs of counsel (page 409). His head-notes were prepared entirely as the result of his own independent study and investigation of the opinions (page 410). His tables of cases were arranged upon a plan

different from Freeman's, he arranging titles according only to the first letter of the name, while Freeman arranged his according to the first three letters in the name (page 411). The foot-notes, containing discussions of legal propositions and citations of analogous cases, were prepared wholly as the result of his independent labor (page 412). He was engaged exclusively upon this work about sixteen months, besides considerable time spent upon volumes 41 and 42, and not included in the sixteen months (page 418).

The arrangement and sequence of the cases in the Callaghan edition of all the volumes from 32 to 46 correspond with the Freeman edition, and the paging of the Freeman edition is preserved by star paging in the Callaghan edition. Upon the title page of each of the Callaghan volumes it is stated that the volume is re-reported and edited by the editor, Ewell, Bailey, Denslow or North, as the case may be, and the name of the same editor appears upon the printed label upon the back of the volume. In mechanical appearance and size, the volumes of the two editions are much the same, being of the general size, character and mechanical appearance of law reports in the various states throughout the country.

Several witnesses testified as experts in behalf of both parties upon the question of infringement, appellee's witnesses testifying that upon comparison of the corresponding volumes of the two editions, they found frequent evidences of infringement in the head-notes, statements of fact, and other matter, especially in volumes 32 to 38, while appellants' witnesses state, as the result of their investigation, that they found no evidence of infringement, and that the apparent similarity in the head notes in the two editions, in cases where such similarity appears, is due to the fact that both reporters seem to have adopted

in such cases the language of the court. Inasmuch as the parties have stipulated to produce before this court copies of all the volumes of the respective editions, for the inspection of the court, the testimony of the experts need not be further considered.

Volume 40 of the Callaghan edition was prepared by Levi J. North, from the Freeman volume, without going to the original records. Mr. North's work upon this volume was substantially the same as that of Mr. Ewell and Mr. Denslow upon volumes 32 to 38, as above set forth, (page 494). Volume 40 was printed by appellants, but never published or sold by them (page 496), and was stored away (pages 496 and 497) immediately after being printed.

Henry W. Bishop, the master to whom the reference was had upon the accounting as to the sales of volumes 32 to 38, reported (page 64) that appellants had sold 2909 volumes at an average selling price of $4.62½ per volume, making a total of $13,451.19. He found the cost of reprinting, binding and selling these volumes to be $6,465.14, leaving a net balance of $6,986.05, for which amount he recommended that a decree be entered. He disallowed a credit claimed by appellants for stereotyping, editorial work and proof-reading, but allowed twelve and seven-eighths per cent. on account of their general expenses in effecting sales. He allowed appellants credit for the entire cost of composition and press-work on all the volumes sold and unsold, but reported that if, as contended by appellee, the cost of the composition and press-work should be ratably distributed over the whole edition, the credits allowed should be reduced to the extent of $896.19. In allowing to appellants twelve and seven-eighths per cent. on account of the general expenses of

conducting their business, Mr. Bishop excluded, as a part of the expense account, $12,000 per year, claimed by the members of the firm as salaries for their services. This amount, if allowed as a part of the expenses of their business, as claimed by appellants, would increase their expense account to seventeen per cent., and would proportionately increase their credits in stating the account. In other words, including their salaries, appellants contend that the general expenses of their business were seventeen per cent. of their receipts, it costing them seventeen cents to sell each dollar's worth of books, and that seventeen per cent. should, therefore, be deducted from the selling price of these books, on account of their expenses, while Mr. Bishop allowed them but twelve and seven-eighths per cent.

John I. Bennett, master, to whom was referred the accounting as to the sales of volumes 39 to 46, reported (page 70), that appellants had sold 2,292 volumes, including four copies of volume 40, which had been in some manner disposed of, although this volume was never actually sold by appellants, as already stated. He found the average selling price to be $4.464 per volume, and the gross receipts from the sales to be $10,231.48. He found the total cost of producing the volumes sold, excluding stereotyping, editorial work and salaries, and allowing appellants a credit of twelve per cent. upon their sales on account of the expenses of conducting their business, to be $5,798.04, leaving as the net receipts from sales $4,433.44, for which amount he recommended a decree in favor of appellee. He refused to allow appellants credit for the entire cost of composition and press-work upon their edition, but distributed this cost upon the volumes sold and unsold, allowing credit only for so much

of the cost of composition and press-work as pertained to the volumes sold. He also refused to charge appellants with the proceeds of the sales of 156 volumes, which he found to be re-sales, this number of volumes having again come into the possession of appellants at second-hand, after the original sales, and being then resold by them. The master found, upon this point, that appellee having been once compensated for the sale of these volumes, in the accounting, they should not be again charged against appellants when resold, but, if the court should be of a contrary opinion, the master found that complainant's damages should be increased by reason of the re-sales of these 156 volumes in the additional sum of $696.38. Both masters disallowed the credit claimed by appellants for stereotyping, editorial work and the salaries drawn by the members of the firm during the period in controversy.

Exceptions were filed by both parties to both reports, covering all the disputed items above mentioned. The exceptions came on for hearing before Judge Blodgett, and on July 9, 1885, he rendered his opinion (page 83). The opinion finds, in substance, that appellee was entitled to the profits realized by appellants on the 156 volumes of re-sales; that the average selling price, as reported by each of the masters, was as correct as could be determined from the proof; that the allowance by the two masters of twelve and twelve and seven-eighths per cent., respectively, to appellants for their expenses in effecting sales, was correct, and that the salaries received by appellants, and which, as they contended, should increase their credit on the expense account to seventeen per cent., were properly disallowed by both masters; that the cost of stereotyping and editorial labor was properly disallowed, and that Mr. Bennett had properly refused the

credit claimed by appellants for the cost of producing the unsold volumes. A final decree was accordingly entered July 9, 1885 (page 88), confirming the masters' reports, except as above stated, and adding to the amount found by Mr. Bennett to be due upon sales of volumes 39 to 46, the additional sum of $340.70 as the profits realized by appellants on the 156 volumes resold, making an aggregate sum of $11,760.19, as the amount of profits realized by appellants upon the sale of the infringing volumes, for which amount the decree was entered and execution awarded for its enforcement. By the decree the court reserved for future consideration the additional sum of $896.19, claimed by appellee under the report of Mr. Bishop, in case the cost of composition and press-work should be ratably distributed over the whole edition of volumes 32 to 38, instead of credited to the volumes sold, as reported by Mr. Bishop. The decree also reserved for future consideration the rights of appellee under an action of replevin, which had been instituted by him to recover possession from appellants of the unsold copies of volumes 32 to 38, and also reserved for further consideration the rights of the parties under a cross-bill filed by appellants to enjoin the prosecution of the replevin suit. The decree found that the defendants, Denslow and Ewell, had no interest in the subject-matter in controversy, and directed that they be dismissed without costs. To reverse this decree the appellants, Bernard Callaghan, Andrew Callaghan, Andrew P. Callahan and Sheldon A. Clark, constituting the firm of Callaghan and Company, have brought this appeal.

Specification of the Errors assigned by Appellants.

Appellants ask a reversal of the decree upon the following grounds:

First. The court erred in finding appellee to be the owner of the copyright in volumes 32 to 46, inclusive, of the Illinois reports, and in decreeing a perpetual injunction and damages against appellants, because such reports are public property and not susceptible of copyright, under the act of Congress, being the work of an official reporter who was a public officer of the State of Illinois.

Second. The court erred in finding appellee to be the owner of the copyright in the volumes in question, and in decreeing a perpetual injunction and damages against appellants, because appellee wholly failed to make any proof of the date of publication of any of the volumes, or any competent proof of the date of depositing them with the clerk of the District court of the United States, or to prove the filing of the printed title of any of the volumes with the clerk in advance of publication, or to prove the deposit of the printed volumes with the clerk within three months after publication, as required by the act of Congress then in force.

Third. The court erred in admitting the memoranda at the bottom of the alleged certificates of William H. Bradley, clerk of the District court of the United States for the Northern district of Illinois, as to volumes 32 to 46, following the certificate proper as to the filing of the printed title, which memoranda purport to show the date

when each of the volumes was deposited; the same being no part of the clerk's certificate, but mere anonymous statements, and it not appearing when and by whom they were made, and they being wholly incompetent to show the date of such deposit.

Fourth. The court erred in excluding the certificates of the auditor of public accounts and of the secretary of state of the State of Illinois, offered by appellants, showing the date of publication of volumes 32 and 34, by the delivery to the state of 553 copies of each and the payment therefor by the state.

Fifth. The court erred in decreeing any relief as to volumes 32 and 34, because, even if the memoranda at the bottom of each of the certificates of the clerk as to these volumes, offered in evidence by appellee, purporting to show the date of the deposit of the volumes, were competent and sufficient proof, then volume 32 was not deposited until more than three months after publication, as shown by the certificate of the auditor and secretary of state; and the filing of the printed title of volume 34, the publication of the volume and the deposit of a copy with the clerk, all appear to have been contemporaneous [illegible] on the same day, to wit: October 23, [illegible]s not appear that the filing of the title pre[illegible]ation.

Sixth. The court erred in granting relief as to volumes 35 and 36, because, as appears by the clerk's certificate as to volume 35 the title was deposited January 28, 1867, while the printed notice on the back of the title page of volume 35, as published, purports to show its entry in the year 1866; and because, as to volume 36, the clerk's certificate shows the title to have been deposited by E. B. Myers and Chandler, while the printed notice

on the back of the title page, as published, purports to show that the same was entered by E. B. Myers alone.

Seventh. The court erred in finding the title to the volumes to be in appellee, he having wholly failed to prove any assignment or transfer from the reporter as to any of the volumes, or from Horace P. Chandler as to his alleged interest in volumes 32 to 38, or any source or means through which appellee derived title to any of the volumes in question.

Eighth. The court erred in decreeing a perpetual injunction and damages against appellants, because of appellee's acquiescence in, consent to, and ratification of the publication of the volumes by appellants, as shown in the depositions of Andrew P. Callahan, Bernard Callaghan, Andrew Callaghan, George W. Beck and Eugene B. Myers, upon the original hearing as to the infringement of volumes 32 to 38, and because of appellee's *laches* in seeking relief.

Ninth. The court erred in finding that the volumes as published by appellants were an infringement and piracy of those published by appellee, and in decreeing an injunction and damages on account thereof, for the reason that each of the volumes, as published by appellants, was a new and independent work, not copied from that of appellee, but prepared by the original and independent labor of appellants' editors.

Tenth. The court erred in compelling appellants to produce their books and papers on the accounting before the master, appellee seeking a forfeiture of these volumes, and appellants being thereby compelled to produce evidence against themselves in aid of such forfeiture.

Eleventh. The court erred in overruling appellants'

first exception to the final report of Henry W. Bishop, master, as to the damages upon volumes 32 to 38, for refusing appellants credit for the cost of stereotyping; and their second and third exceptions to such report, for refusing appellants credit for the salaries paid them at the rate of $12,000 per year; and in confirming the report and awarding a decree thereon.

Twelfth. The court erred in overruling the following exceptions taken by appellants to the report of John I. Bennett, master, as to the damages on volumes 39 to 46, viz:

First exception, for finding the number of volumes, sold by appellants, to be 2,292, instead of 2,189.

Second exception, for finding that appellants admit the sale of 2,260 volumes, instead of 2,189.

Third exception, for finding the total number of bound volumes on hand to be 262.

Fourth exception, for finding the total number of volumes on hand and sold to be 3,854.

Fifth exception, for finding the average selling price of appellants' volumes to be $4.46, instead of $4.34.

Sixth exception, for finding appellants' gross receipts from sales to be $10,231.48, instead of $9,459.38.

Seventh exception, for finding the known cost of volumes sold to be $4,679.55.

Eighth exception, for crediting appellants on their expense account, with only twelve and one-half per cent. of their gross sales, instead of seventeen per cent.

Ninth exception, for finding the total cost of producing appellants' volumes to be only $5,798.04.

Tenth exception, for finding appellants' net receipts on

sales to be $4,433.44, whereas there were no net receipts, the expenses of production exceeding the gross receipts.

Eleventh exception, for finding appellants' net profits on such sales and appellee's damages to be $4,433.44, and recommending a decree for appellee for this amount, there being no net profits and consequently no damages due to appellee.

Thirteenth exception, for refusing to credit appellants with the cost of production of unsold volumes.

Fourteenth exception, for refusing appellants credit for the amount paid for editorial work as part of the cost of production.

Fifteenth exception, for refusing appellants credit for stereotyping their volumes, as part of the cost of production.

Sixteenth exception, for refusing appellants credit for the amount paid them as salaries or compensation for their services.

Seventeenth exception, as to the mode of reporting pursued by Mr. Denslow, as unsupported by the testimony.

In overruling all which exceptions the court erred and likewise erred in confirming the report of said Master, and awarding a decree in behalf of appellee thereon, the court thereby refusing to allow appellants credit in the various particulars specified in their said several exceptions.

Thirteenth. The court erred in sustaining appellee's first and second exceptions to the report of John I. Bennett, master, as to volumes 39 to 46, for finding that appellants sold 2,292 copies, instead of 2,448, and for disallowing appellee's claim for damages as to 156 copies, sold

by appellants at second-hand; in sustaining which exceptions the court erred, and likewise erred in decreeing to appellee $340.70 as profits realized by appellants upon the sale of 156 copies at second-hand, such copies having already once been accounted for to appellee upon their original sale, and appellee not being entitled to a second recovery therefor when sold at second-hand.

Brief of the Argument.

I.

LAW REPORTS ARE PUBLIC PROPERTY, NOT SUSCEPTIBLE OF PRIVATE OWNERSHIP, AND NOT THE SUBJECT OF COPYRIGHT UNDER THE ACT OF CONGRESS.

Conceding, for the purposes of this branch of the argument, that a full and literal compliance has been shown by appellee with all the conditions of the act of Congress requisite to entitle him to a copyright of the volumes in question, we challenge at the outset the existence of any literary property in law reports, and deny that they are, or can be, the subject of copyright under the act of Congress. And, while it has sometimes been supposed that *Wheaton* v. *Peters*, 8 Pet., 591, has established the right of the reporter of judicial decisions to copyright his work, it will be hereafter shown that this question was not decided in that case, and is still an open question, upon which the judgment of this court is now invoked.

The official reporter of the Supreme court of Illinois, during the period of the publication of the original volumes in question—from 32 to 46, inclusive—was Norman L. Freeman, by whom the original and official edition was prepared, and from whom appellee claims to have derived his title. The reporter was then, and still is, a public officer, whose office was created and its duties defined by statute. The office was created by chapter 29 of the Revised Statutes of Illinois of 1845, which enacted as follows:

"Sec. 20. The court shall appoint some person learned in the law, to minute down and make report of all the principal matters drawn out at length, with the opinion of the court in all such cases as may be tried before the said court; and the said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk.

"Sec. 21. The reporter, before entering upon his duties, shall be sworn by some one of the justices of the Supreme court, faithfully to perform the duties of his said office. He may, for misconduct, neglect of duty, incompetency, or other cause shown, to be entered of record, be removed from office."

Mr. Freeman, therefore, in the preparation of the official edition of these reports, with the infringement of which we are charged, was not an author within the meaning of the act of Congress governing copyrights. Indeed, the power of Congress, under the constitution, to legislate upon the subject of copyrights is limited to authors, and does not extend to officers of the government engaged in a public or official duty. Section 8, of article 1 of the Constitution, enumerating the powers conferred upon Congress, includes the following:

"8. To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The framers of the Constitution plainly had in view the necessity of affording protection to the literary productions of private authors, and never intended that by virtue of such legislation a public officer could claim private dominion and ownership, or assert a monopoly in the result of his official labors, for which he was employed and paid by the state. Mr. Freeman, in the preparation of his reports, was not an author within the meaning of the constitutional provision above cited, and of the act of

Congress of 1831, then in force. He was a public officer, designated by law to the discharge of a public duty, and sworn to its faithful performance. He was furnished by the court with the necessary materials for his work, consisting of the opinions of the court and the records of the cases, all of which were themselves public property, accessible to every citizen of the state. These materials he was required to prepare and publish, not for private gain, but for the public good. The object of the statute in creating the office, and of the court in appointing the officer was to secure the publication of the decisions of the court for the use and information of the public. Any restriction or limitation in the nature of private ownership or monopoly imposed upon this public labor of the reporter, is in derogation of common right and against public policy.

It was decided by this court in *Wheaton* v. *Peters*, and is now universally conceded, that the opinions of the judges are public property, and not the subject of copyright by the reporter. This necessarily results from the relation sustained by the judges toward the people, they being public officers employed and paid to render a purely public service. The result of the labor of the judges is, therefore, the property of the people by whom and for whom they are employed, and if any such element of literary property attaches to their labors as to render them susceptible of copyright, the people alone are entitled to such copyright. In like manner the reporter being a public servant or agent, the product of his labor is likewise the property of the people, and if copyrighted at all, it can only be done in the name of, and for the benefit of the people. This principle is universally conceded as regards the judges, and is equally applicable

to the case of an official reporter. The doctrine is clearly stated by Mr. Drone in his work on copyrights, at page 161, as follows:

"It is obvious that the copyright in an opinion written or delivered by a judge can not be acquired by a reporter or the first publisher on the ground of authorship, for the reason that he is not the author. It is not less clear that the judge who pronounces the decision is not entitled to the copyright therein, because he is not the owner of the property. Hence, neither in the judge nor in the reporter will a valid copyright vest, except by a derivative title. The copyright must be secured by the owner of the property; and all difficulty disappears when it is determined who is the owner. Elsewhere it is shown that any person who employs another to prepare a work, may, by virtue of the contract of employment, become the owner of the literary property therein. On this principle, the people who employ and pay judges are the rightful owners of the literary property in the opinions written by them. Hence, the United States government may secure to itself the copyright in the decisions pronounced in the federal courts, and each state may do the same with the opinions of its own judges. And the government may confer upon any person the right of securing, or the copyright after it has been secured."

The same principle is stated by Mr. Morgan in his Law of Literature, volume 2, page 569, as follows:

"410. An examination of all the reported cases warrants us in the conclusion that the reason why a judge can have no literary property in opinions pronounced by himself, upon legal questions presented or discussed before him, is simply and solely because he is but the mouthpiece of the state, paid by the people or the state, to utter and construe their law. We have seen that the courts are the distributors of the justice of the people, and that, by the theory of law, the state hears all disputes of its citizens.

"But, if the reason is a good one, it would seem to apply equally to a reporter, who also receives a salary from the people, to catch the opinions as they fall from the lips

of the judges appointed by the people, and to arrange and publish them for the use of the people, and that there would, therefore, be no copyright in the labors of an official reporter, appointed by the court or elected by the people, provided his salary or the compensation for his services be paid from the public treasury. In *Little* v. *Hall*, (18 How. 165), it was held that, under the statute of the state of New York, by virtue of which Judge Comstock was appointed reporter of the decisions of the Court of Appeals, no copyright could be had in the reports."

The question is largely to be determined upon principle and but little light can be derived from the decisions of the courts. It is true that in several reported cases, the English Court of Chancery has recognized a literary property in the work of a law reporter, and has granted injunctions to prevent the infringement of his rights. But in all these cases the reporter was a private citizen, occupying no official relation, and owing no duty to the public. Official law reporting by a public officer is now, and for centuries past has been, wholly unknown in England. The Year Books are believed to be the only publication of the reports of the courts in England, which were made by official reporters, designated and employed by the Crown. Ever since the Year Books, the matter of publishing the reports of the courts of England, has been exclusively in the hands of private persons, the present system being that of a council of members of the profession, under whose supervision the work is done by barristers employed for that purpose, the entire enterprise being wholly private. The English decisions are, therefore, not in point upon the question under consideration.

In this country, the case of *Wheaton* v. *Peters*, 8 Pet., 591, has been supposed to recognize the right of an official reporter to literary property in his

work. It was a bill for an injunction to restrain the publication by Peters and others of a series of condensed reports of the decisions of this court, including the cases embraced in the first volume of Wheaton's reports. The point under discussion was fairly presented, and fully argued by a distinguished array of counsel. The argument of Mr. Ingersoll, upon this point, beginning at page 618, is a master-piece of legal reasoning, and the court is respectfully asked to examine that argument in its consideration of the point now under discussion. Whether the court in *Wheaton* v. *Peters* intended to decide that Mr. Wheaton was entitled to a copyright in his reports, is not easily determined. The opinion itself contains no allusion to this point, and the case was remanded to determine whether there had been a compliance with the statutory provisions requisite to a valid copyright, such as the publication of the notice required by the act of Congress of 1790, and the delivery of a copy of the book to the Secretary of State.

A dictum of Mr. Justice STORY, who was a member of this court when *Wheaton* v. *Peters* was decided, will doubtless be cited by counsel for appellee, as affording some ground for believing that the judgment in *Wheaton* v. *Peters* was intended as a recognition of the reporter's right to a copyright. In *Gray* v. *Russell*, 1 Story, 11, decided five years after *Wheaton* v. *Peters*, Mr. Justice STORY, alluding to that case, uses the following language (page 21):

"It was held that the opinions of the court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause

went back to the Circuit court for the purpose of further inquiries as to the fact, whether the requisites of the act of Congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright; for that was all the work which could be the subject of copyright; so that if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress."

Upon the other hand, we have the contemporaneous testimony of Mr. Peters, who was a defendant in the case, and the reporter of the opinion, while the case was still fresh in the recollection of all parties, who says in a note to *Wheaton* v. *Peters*, 8 Pet., 618, alluding to the argument upon the right of the reporter to copyright:

"As the court gave no opinion upon this point, and, as the reporter has been informed, did not consider it when the case was disposed of, a great portion of the arguments upon it by the counsel for the appellees has been omitted in this report. Should the case be brought again before the court, as it will be in the event of the issue directed by the court being found for the appellants, this point will be urged to a decision."

Heine v. *Appleton*, 4 Blatchf., 125, affords an instructive analogy to the point under discussion. It was there held that an artist, who was employed by the government of the United States to accompany a naval expedition and to make sketches, which were afterward published by the government with the reports of the expedition, was not an author within the meaning of the act of Congress, and was not entitled to copyright. And his sketches being made for the government, by whom he was employed, it was held that their publication by the government gave them to the public at large.

It has already been said that the modern English au-

thorities afford little light upon this question, because official reporters are now unknown in England. There is, however, a series of English decisions, having a strong bearing, by analogy, upon this question. The publication of the laws, as such, in England has always been claimed as an attribute of sovereignty, and the exclusive right to publish them was formerly granted by letters patent from the Crown. These patents were granted at an early date. In the *Company of Stationers* v. *Seymour*, 1 Mod. Rep., 256, decided in 1677, the court say:

"And particularly the sole printing of law books has been formerly granted in other reigns. * * * Queen Elizabeth, King James and King Charles the First granted such patents as these, and the law has great respect to common usage."

The early English cases under these letters patent afford strong support for the position that the laws are not private property, and are not susceptible of private ownership, the right to their publication resting in the sovereign. The case of *The Stationers* v. *The Patentees*, decided in parliament in 1666, was such a case. In 1608 a patent had been granted by James I. for printing law books, which finally came to the ownership of one Atkyns. The company of stationers printed Roll's Abridgment, and Atkins obtained an injunction in chancery to restrain the printing. On appeal from the Chancery to the House of Lords, it was argued by counsel for the patentee that "The king hath a particular prerogative over law books, and so he would have had if the art of printing had never been known. The reasons are, first, all the laws of England are called the king's laws, etc.; second, the salaries of the judges are paid by the king; and reporters in all courts at Westminster were paid by

the king formerly." And the Lords sustained the patentee under the king's grant. Carter, p. 89; Bac. Abridg., title Prerogative, F. 5.

So in the case of *Roper* v. *Streater*, decided in 1672. Roper had bought of the executors of Mr. Justice Croke, the third part of his reports and printed it. Streater had a grant from the crown for printing all law books, and Roper brought an action against him for printing without authority. Streater pleaded the king's grant, to which Roper demurred, and there was judgment for the plaintiff, holding the king's grant not good. But upon writ of error to the House of Lords this judgment was reversed, upon the following, among other grounds: that this privilege of granting patents by the king for the printing of law books had always been allowed; that it concerned the state, and was a matter of public care; and that the king had the making of judges, sergeants and officers of the law. Skinner, 234; Bac. Abridg. title Prerogative, F. 5.

The authorities are not agreed as to the foundation of the right of the sovereign as thus asserted, over the publication of the laws. By some judges it has been explained upon the theory of an absolute property in the sovereign, as the head of the state; while others have treated it as a branch of the royal prerogative. Lord Mansfield was of the former opinion. In *Millar* v. *Taylor*, 4 Burr., 2304, decided in 1769, referring to the case of *Beckett* v. *University of Cambridge*, 1 W. Black., 105, in which the King's Bench had upheld the doctrine of the king's exclusive right to the publication of the laws, Lord Mansfield says (page 2404):

"We rested upon property from the king's right of original publication. Acts of parliament are the works of the legislature; and the publication of them has always

belonged to the king as the executive part, and as the head and sovereign."

Mr. Justice Yates, in the same case, *Millar* v. *Taylor*, 4 Burr. (page 2383), asserted the prerogative theory in strong terms:

"Upon the whole of this prerogative claim of the crown, it appears to me that the right of the crown to the sole and exclusive printing of what is called prerogative copies, is founded on reasons of religion or of state. The only consequences to which they tend are of a national and public concern, respecting the established religion or government of the kingdom; and have no analogy to the case of private authors."

Lord Chancellor Lyndhurst, in *Manners* v. *Blair*, 3 Bligh, N. S., 391, which was a case involving a patent from the crown of the exclusive printing of Bibles, also adopts the prerogative theory, and attributes the power of the crown over the publication of the laws and of the Bible (page 402) "to the character of the duty imposed upon "the chief executive officer of the government to superin- "tend the publication of the acts of the legislature, and acts "of state of that description, and also of those works "upon which the established doctrines of our religion are "founded—that it is a duty imposed upon the first execu- "tive magistrate, carrying with it a corresponding pre- "rogative."

Whether the theory of the royal prerogative, or of a private property in the crown be accepted, in either event the sole right of publication is recognized in the sovereign, and in either event the analogy is equally striking in the case at bar. If the right of publishing the laws in England pertained to the sovereign power, then *a fortiori* does it pertain to the sovereignty here; that is to the public, to the people, or to their government, and no element

of private literary property can attach to such publications. And if, as in this case, appellants as private citizens are asserting the right to publish the laws of the state, the state alone can complain.

The learned judge of the Circuit court in ruling adversely to us upon this point, conceded that there would have been much force in our contention, had the official reporter been a salaried officer during the period of the publication of his reports. Upon this point Judge DRUMMOND says (page 32):

"It will be observed that the plaintiff claims under a purchase from the reporter. He was an officer of the state, and prepared the volumes under the authority of law, and it is insisted that because he was a public officer and acted in an official capacity, he had no copyright in these volumes. In one aspect of the case there would seem to be great force in this objection. For example, if an adequate compensation was paid by the state to the reporter, for the work done by him in preparing volumes of reports, then whatever property there was in the volumes arising from the labors of the reporter, ought to belong to the state and not to him. But I cannot find that view was taken of the case by the state and the court in the appointment of the reporter at the time. On the contrary, it seems to have been considered that the reporter was entitled to any profits which might arise from the sale of these volumes, and that they constituted a part of the perquisites of his office. He was appointed under the authority conferred by section 20 of chapter 29 of the revised statutes of 1845, which required the court to appoint a reporter. Mr. Freeman was appointed under the act in 1863, and re-appointed in 1869, and there appears to have been no regular salary. The office seems to have been different then from what it is now, when, it is said, adequate compensation is given by the state to the reporter for the services performed by him."

It is true that Mr. Freeman, during the period of his publication of volumes 32 to 46, received no direct salary

from the state. He was, however, amply compensated for his services through the purchase by the state, under acts of the legislature then in force, of 553 copies of each of his volumes at the enormous price of $6 per copy. Sections 22 and 23 of chapter 29 of the Revised Statutes of Illinois of 1845 made it the duty of the reporter to deliver to the Secretary of State as soon as convenient, after publication, such number of copies of each of the volumes of his reports as would enable the secretary to distribute them to a large number of designated public officers of the United States, of the State of Illinois and of other states, together with one hundred copies in addition to be deposited in the office of the secretary of state. Section 24 of the same chapter provided that the reporter should be paid for these volumes at the same price for which they were sold to individuals. The number of copies necessary to supply the state, under the statute, at this period, was 553, and the warrants of the secretary of state and of the state auditor, which we offered in evidence as to volumes 32 and 34, showed the delivery of this number to the state.

By an act of the general assembly of the State of Illinois, entitled: "An act in relation to the reports of the decisions of the Supreme court," approved February 8, 1865, Public Laws of Illinois, 1865, page 103, it was provided as follows:

"SECTION 1. That until otherwise provided by law, the "reporter of the decisions of the Supreme court of this state, for such copies of the reports of said decisions as he shall deliver to the secretary of state, according to the laws of this state, shall be entitled to receive at the rate of six dollars per volume."

"SECTION 2. This act shall include and relate to the 31st volume of Illinois Reports, and shall take effect and be in force from and after its passage."

This act continued in force until 1877, and under its provisions Mr. Freeman received the handsome price of $6 per copy for each copy of every volume sold the state, from 32 to 46, and long afterward. It was not a direct salary, it is true, but was an indirect and far more generous means of affording him compensation for the discharge of his duties, and yielded him a far larger income than was received by the judges themselves. Indeed, it has been generally understood by the profession and by the trade, and will not be questioned by Mr. Freeman's own publisher, the appellee in this cause, that this method of compensation was adopted at the earnest solicitation of the reporter himself, as likely to yield him a far larger revenue than would be derived from a fixed salary. The volumes appeared at an average rate of four each year. Five hundred and fifty-three copies of each would amount to 2,212 copies furnished the state annually. The most generous and extravagant price which can be possibly fixed as their first cost is $2 per copy, leaving a net profit of $4 on each copy furnished the state, thus making upon the 2,212 copies annually furnished the state, a clear profit to the reporter of $8,848. All this from the state alone, while the profits derived from his sales to the trade and to the profession largely exceeded the figures given, since such sales were undoubtedly larger than those to the state, and the sales to the state having paid the first cost of manufacturing the entire edition, the profits on sales to the trade and to the profession were correspondingly greater. It is probably below rather than above the actual figure to estimate the reporter's compensation during the years in question at from $20,000 to $25,000 annually. The judges whose opinions he reported during these years received an annual salary of $1,200. Com-

Last That Time

ment may be spared. The profits thus realized by the reporter from the sale of his books were so enormous that the legislature was at last compelled to interfere for the protection of the state and the public. And by an act approved May 17, 1877, the price to the state and to all purchasers was reduced to $2.25 per copy, and the reporter was given a fixed salary of $6,000 per year, being $1,000 more than the salary of the judges of the Supreme court.

But it is confidently submitted that the nature of the reporter's functions, and the question of copyright in his reports, are wholly independent of the method by which he receives compensation for his services, or whether, indeed, he is compensated at all. Private citizens are frequently designated to the performance of public duties, without compensation, and in the performance of such duties they may, and do, make written reports of their proceedings for the benefit of the state. It has never yet been asserted that such reports are the private literary property of the persons by whom they are made. In England many of the law lords who sit in the highest judicial tribunal of that country, the House of Lords, are retired judges, without salary and without pension. Their opinions, as reported, are a part of the law of Great Britain. But it would not be pretended that such opinions are the literary property of the law lords, by whom they are delivered, or that they are entitled to copyright them under the act of Parliament now in force concerning copyrights. And it is idle to assert that a public service rendered to the state, without salary, entitles the public servant, so rendering it, to copyright the result of his labors, when, if a salary were paid, he would not be entitled to such copyright.

The sole test, therefore, in determining the right of private dominion and ownership in literary productions, is whether the writer is engaged in a private enterprise, and therefore an author within the meaning of the constitution, or whether he is engaged in a public service, which forever dedicates the result of his labors to the public, whom he serves. If he falls within the latter class, then, without exception, the result of his labors, when published, becomes the property of the public. This is true of the labors of judges, presidents, governors, cabinet officers, attorneys-general, revisers and editors of public statutes under government employment, and, generally, of all officers whose duty it is to publish certain reports, or to make public in any way the result of their labors. Many of the reports of such officers contain far more literary labor and display more originality than the ordinary volumes of law reports; yet it would be idle to assert any private literary property in such officers in their published reports and productions. And no satisfactory reason can be assigned for giving exclusive privileges to the work of a court reporter, which would not apply with equal force to all other public officers.

The doctrine of exclusive literary ownership in law reports contended for by appellee is also contrary to public policy. The decisions of the Supreme court of Illinois are part of the law of the land. The reports of those decisions by the official reporter are made by statute evidence of the law. They are, therefore, publications of the laws of the state, in like manner as are the published statutes and acts of legislature. Public policy demands the widest and freest dissemination of the laws, and any restraints or fetters placed upon such dissemination, are opposed to the wisest public policy, and contrary to the

entire spirit and genius of our jurisprudence. The humblest citizen is presumed to know the law, and ignorance of its provisions can never avail him as an excuse for its violation. Hence the necessity of the widest publicity to every expression of the law, whether legislative or judicial, and of the utmost freedom in extending and encouraging its publication. To permit a private citizen to become the exclusive proprietor of the published acts of the legislature, or of the published decisions of the courts, or to recognize any element of private or literary ownership in such publications, is in direct contravention of these elementary principles.

The dangers incident to exclusive ownership in the publication of the laws, should such a doctrine ever be recognized by the courts, are well illustrated by appellee's conduct with reference to some of the volumes in controversy. For six years succeeding the great Chicago fire of 1871, he permitted volumes 32 to 38 to remain out of print, and repeatedly announced to appellants, and to members of the legal profession that he should not reprint them. And it was not until after appellants had begun the publication of their volumes that he reluctantly undertook the tardy pulication of volumes 37 and 38. The volumes from 32 to 36 inclusive he has never republished. The legal profession and the people of a great state have thus been deprived for a long series of years of a considerable portion of the published laws of the state, by the parsimony or perversity of appellee, who will not publish himself, and who seeks to enjoin others from publishing.

In view, therefore, of what we insist to have been the plain and manifest intention of the court in *Wheaton* v. *Peters*, to carefully refrain from any expression of opinion

upon the right of an official reporter to a copyright, we may appeal with confidence to the court to consider the question as still an open one. And if an open question, there can be no logical escape from the conclusion that the reporter, being a public officer, engaged in the discharge of a sworn and public duty, the element of private literary property or ownership is, *ex necessitate*, eliminated from his work, and it stands upon the same foundation as the labor of the judge upon the bench in the preparation of the opinion. And if the judge who creates and formulates the opinion, in the exercise of perhaps the highest effort of brain work and creative power employed in any branch of the public service, can have no literary property or private ownership in his work, then *a fortiori* must such literary property and private ownership be denied to his subordinate officer, who merely prepares the opinion of the court in convenient dress and form for public use.

II.

Appellee is not entitled to relief because of Non-compliance with the Conditions of the Act of Congress of 1831, concerning Copyrights.

It is proposed under this branch of the argument to consider the second to the seventh assignments of error, inclusive, all of which have relation to the failure of appellee to comply with the conditions of the act of Congress, concerning the filing of the printed title in advance of publication, and the deposit of the printed volume within three months after publication. And because of appellee's non-compliance with these conditions, if for no other reason, it is confidently submitted that the decree should be reversed.

The original edition of volumes 32 to 46 was published between the years 1865 and 1869. They were, therefore, governed by the act of Congress of 1831, then in force, which provided three conditions or requisites to obtaining a copyright.

1. Filing a printed copy of the title of the book in the clerk's office of the district court of the United States for the given district, before publication.

2. Printing notice of the copyright on the title page, or on the succeeding page.

3. Delivery of a copy of the book to the clerk of the district court within three months after publication. 4 U. S. Statutes at Large, 436.

The errors assigned upon this branch of the case may be better understood by a brief review of the authorities. The uniform current of authority, both English and American, is that the conditions imposed by the statute are indispensible to the creation of a copyright, and that a strict performance of these conditions is absolutely necessary to the existence of any literary property in the published work, and of any right of action for an infringement.

Wheaton v. *Peters*, 8 Pet., 591.
Merrell v. *Tice*, 104 U. S., 557.
Murray v. *Bogue*, 1 Drew., 353.
Jollie v. *Jaques*, I Blatchf., 618.
Baker v. *Taylor*, 2 Blatchf., 82.
Struve v. *Schwedler*, 4 Blatchf., 23.
Chase v. *Sanborn*, 6 Pat. Off., Gaz., 932.
Parkinson v. *Laselle*, 3 Sawyer C. C., 330.
Drone on Copyright, 362, *et seq.*, and cases cited.

Wheaton v. *Peters* was decided under the statutes of 1790 and of 1802. The act of 1790 required the deposit of a printed copy of the title with the clerk in advance of publication; publication of a copy of the record within two months thereafter in one or more newspapers, for four weeks; and delivery of a copy of the book to the Secretary of State of the United States, within six months after publication. 1 U. S. Statutes at Large, 125. The act of 1802 imposed as an additional condition the printing of the notice of entry of copyright on the title page or on the succeeding page. Construing these statutes and the conditions which they imposed, the court in *Wheaton* v. *Peters*, 8 Pet., 664, use this language:

"But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature we can learn only by their official acts. Judging, then, of these acts by this rule, we are not at liberty to say they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance?

"But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right? The answer is that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. * * * The rule by which conditions precedent and subsequent are construed, in a grant, can have no application to the case under consideration, as every requisite in both acts is essential to the title."

Accordingly the case was remanded to the Circuit court to order an issue of fact to be tried by a jury, to determine whether, within two months after recording the title in the clerk's office, a copy of the record thereof was

published in one or more newspapers for four weeks; and whether a copy was delivered to the Secretary of State, after publication, and in the manner prescribed.

The same construction is given in England to the statute 5 and 6 Victoria, Chapter 45. Section 24 provides that no proprietor of copyright in any book which shall be first published after the passing of that act, shall maintain any action, either at law or in equity, or any summary proceedings in respect to any infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have entered his book in the book of registry of the Stationer's Company. And it is held that the plaintiff cannot maintain a bill for an injunction to restrain the piracy of his book, unless he has duly registered it in accordance with the provisions of the section above cited.

Murray v. *Bogue*, 1 Drew., 353.

The doctrine of *Wheaton* v. *Peters* has been uniformly followed in construing the act of 1831, under which appellee claims copyright. In *Jollie* v. *Jaques*, 1 Blatchf., 618, Mr. Justice NELSON says, page 620:

"It will be seen, therefore, by the provisions of this act (1831), that there are three preliminary steps requisite to the securing of a valid copyright: 1. The deposit of a printed copy of the title, before publication, with the clerk of the district court. 2. Notice to the public, by printing in the place designated, the fact of the entry in the form prescribed by the statute; and 3. The deposit with the clerk of a copy of the book or musical composition within three months from the date of the publication."

Baker v. *Taylor*, 2 Blatchf., 82, was a bill to enjoin an alleged infringement of plaintiff's copyright in a book entitled, "The Sacred Mountains, by J. T. Headley." The bill alleged the deposit of plaintiff's printed title in the

clerk's office November 10, 1846, and the delivery of a printed copy of the book to the clerk on the same day. The Court, Betts, J., following *Wheaton* v. *Peters*, held that the copyright was not perfected without a strict compliance with the provisions of the statute, and held the performance of the three conditions named to be indispensible. The affidavit of the defendant stated that plaintiffs had made sales prior to November 10, 1846, when the title was deposited. For plaintiffs it was argued that these alleged sales were only consignments of the books in advance of publication. The court say:

"There is no proof to support this version of the facts. A sale naturally imports publication. The purchaser having a right to know the contents of the book, and make them known to others, no presumption can be raised that the right was not exercised, or that the actual publication did not follow the sale. On the contrary, the presumption is the other way. And the inference is strong that actual publication was made, as sworn to by the defendant, anterior to the 10th of November, from the fact that a printed copy of the work then complete was on that day deposited in the clerk's office, the deposit of the book complete for circulation and the deposit of the title page being simultaneous acts. The fourth section of the act, in express words, denies all benefit to a person under the act unless he shall, before the publication of his work, deposit the title page, etc. The plaintiffs have failed to show themselves entitled to the injunction prayed for."

Chase v. *Sanborn*, 6 Pat. Off. Gaz., 932, decided by the United States Circuit court, for the district of New Hampshire, in 1874, is a strong case in point. It was a bill for an injunction against an alleged piracy of complainants' copyrights. The court found that sufficient evidence was shown by complainants of the deposit of the printed titles with the clerk, but no evidence that this was done before publication; also that the printed copies of the books were

delivered to the clerk, but that there was no evidence of such delivery within three months after publication. And Mr. Justice Clifford says:

"Deposit of the printed copy of the title of the book must be made before publication in the clerk's office of the District court of the district wherein the author or proprietor shall reside, and he (the author or proprietor) must deliver a copy of the book to the clerk of said District court within three months from publication of the same, else he is not entitled to the benefit of the act. Such are the absolute requirements of the act of Congress; nor is it competent for the Circuit court to disregard the requirements."

And the same construction has been repeatedly given to the act of Congress of 1870, which requires the printed title to be transmitted to the librarian of Congress before publication, and two copies of the book to be transmitted within ten days after publication.

Parkinson v. *Laselle*, 3 Sawyer C. C., 330.
Drone on Copyright, 266, and cases cited.

In the light of these authorities, it is only necessary briefly to direct the attention of the court to the errors assigned touching the failure of appellee to prove a compliance with the statutory conditions. The second error assigned is based upon the entire failure of appellee to prove any date of publication of any of the volumes, the absence of any competent proof as to the date of depositing any of the volumes with the clerk of the District court, the failure to prove that the printed title was filed with the clerk in advance of publication and the failure to prove the deposit of the printed volumes within three months after publication. The record may be searched in vain for any proof upon the part of appellee, as to the date of publication of any of the volumes in question. The only

proof whatever touching a compliance with the statutory conditions consists in the certificates of the clerk of the District court, showing the filing of the printed titles of volumes 32 to 46 (pages 498 to 507). Conceding this proof to be sufficient evidence of the fact that the printed titles were filed, it wholly fails to enlighten the court as to whether such filing preceded or followed the publication of the volumes, there being no proof whatever upon the latter point.

The third assignment of error specially challenges the proof admitted by the Circuit court, as to the date of the deposit of the printed volumes with the clerk. The only proof offered by appellee upon this point consists of a mere memorandum at the bottom of each of the clerk's certificates concerning the filing of the printed title. The memorandum as to the alleged deposit of volume 32 (page 498) may be taken as a sample of them all. It appears at the bottom of the certificate, following the signature and official seal of the clerk, certifying the transcript of his record as to the filing of the printed title, and is in these words:

"Work deposited Jany. 17, 1866, Wm. H. Bradley, "Clk."

There is no certificate by the clerk that the book was deposited on that or any other day, and indeed, under the act of Congress of 1831, such a certificate by the clerk would have been wholly gratuitous, and would have afforded no competent proof as to the fact in question. The memorandum is not attested by the official seal of the clerk, nor was any proof offered as to the genuineness of the signature purporting to be that of the clerk. Even if this signature had been proven to be that of the clerk, the memorandum would still have been incompetent, being at

the most a mere letter or written statement by the clerk, with no opportunity afforded to appellants for cross-examination. To the introduction of these memoranda we objected (page 497), upon the ground that they constituted no part of the clerk's certificates, but were merely anonymous statements, without proof as to when, or by whom they were made, and that they were, therefore, wholly incompetent to show the date of the deposit of the volumes. Our objection was overruled, and exception was taken to the ruling of the court.

The deposit of the printed volumes within three months after publication was indispensable to appellee's copyright and to his right of action. The burden rested upon him to prove, first, the exact date of publication, as to which he made no pretense of proof; and, second, to show the deposit of the volumes with the clerk within three months thereafter. Proof of either date without the other is wholly unavailing, since the date of publication must be known, to determine whether the deposit, even if properly proven, was within the period fixed by the act of Congress, as well as to determine whether the filing of the title preceded publication. The date of the deposit of the printed volumes with the clerk was directly in issue, being averred by the original bill, and strict proof of this allegation being required by our answer. If the volumes were, in fact, ever deposited with the clerk, competent proof should have been tendered upon this, as upon all other points in issue, and appellee's failure to prove this material and vital point, is absolutely fatal to his right of recovery.

Merrell v. *Tice*, 104 U. S., 557, is directly in point. It was an action at law to recover damages for the infringement of a copyright. The only proof of the date of de-

posit of the printed copies of the book was a similar memorandum at the bottom of the certificate of the Librarian of Congress, in these words:

"Two copies of the above publication deposited December 6, 1876."

Objection was made by the defendant to the admission of such memorandum, but the objection was overruled, and the court permitted the memorandum to go to the jury. The case was brought to this court upon a writ of error, and the judgment was reversed solely because of the admission of such memorandum. Mr. Justice BRADLEY, delivering the opinion of the court, citing the provisions of the present act of Congress touching the conditions requisite to the granting of a copyright, says (page 560):

"On a mere inspection of these enactments, it is very obvious that the deposit of two copies of the book after its publication, either with the librarian of Congress, or in the mail addressed to him, is an essential condition of the proprietor's right; and must in some way be proved in an action for infringement. The words of the law are: 'No person shall be entitled to a copyright, unless he shall also, within ten days, etc., deliver at the office of the librarian of Congress, or deposit in the mail, etc., two copies of such copyright book.' Nothing can be plainer than this.

"Then what is competent proof of such a deposit? If, after complying with all the requisite conditions, the law had authorized letters patent for the copyright, to be issued to the proprietor, such letters would be competent, if not conclusive evidence that the conditions had been complied with. But no such letters are issued in the case of copyright. It is contended, indeed, that the librarian's certificate answers the same purpose. But it is plain that this certificate was only an exemplification of the record required to be made on the filing of the title, before publication. Its form, as prescribed by the law, and its

contents as shown by the copy produced in evidence, show that it relates to nothing else. The publication of the book, and the deposit of copies thereof, may not take place until the lapse of months afterward. The certificate, therefore, has no relation to the deposit of the books. The record, of which it is an exemplification, is made without reference to any such deposit. Whether, after the deposit has been made, the certificate of the librarian, under his official seal, that the books were deposited on such a day, would be competent evidence of the fact, is not now the question; and it may admit of considerable doubt. Perhaps a certificate of the librarian, attached to a copy of the book, certifying that two copies of the same book, or of which that is a true copy, were deposited in his office on such a day, would be competent evidence, inasmuch as the librarian's office is a public one; the copyright books deposited with him, are quasi records, kept in his custody for public examination—one object, no doubt being to enable other authors to inspect them, in order to ascertain precisely what was the subject of copyright. But we express no opinion whether such a certificate would be competent or not. In the present case, no such certified copy of the books deposited, nor a certificate of the fact that they were deposited, was adduced in evidence. The memorandum under the certificate had no validity as evidence. It might have been put there by any person. It would be unsafe to hold that a memorandum under a certificate, or indorsed upon it, is part of the certificate. A certificate under seal, when invested with legal force and effect, is a solemn instrument, and ought to be complete, certain and final in itself, without any collateral addition or commentary. Its very form and character, as a certificate, presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contained in the body of the instrument, has not this verification and protection. Such extraneous matter may be added by other persons, or may be erased or altered without involving the offense of forgery, or alteration of the certificate. Memoranda of various kinds are frequently indorsed on instruments of this sort, for the convenience of the possessors, either to indicate their contents or fur-

nish other information with regard to their subject-matter. To hold that such memoranda are evidence, except as against the party making them would be wholly inadmissible. We are satisfied that the evidence offered and objected to, was incompetent for any purpose in the cause. The judgment must be reversed, and the cause remanded to the Circuit court, with directions to award a new trial; and it is so ordered."

Unless, therefore, the court is prepared to reverse its ruling in *Merrell* v. *Tice*, that case is conclusive upon our present contention, and the decree of the Circuit court must be reversed accordingly. There still remain, however, other objections to be considered as to the alleged copyright in volumes 32, 34 and 35.

The fourth and fifth assignments of error relate to the refusal of the Circuit court to admit the testimony offered by appellants as to the date of the publication of these volumes, showing conclusively that, as to them, appellee failed to comply with the conditions of the act of Congress. Appellants offered in evidence (page 510), a certificate of the Auditor of Public Accounts of the State of Illinois, and a certificate of the Secretary of State, showing the sale, by Norman L. Freeman, reporter, to the state, for the use of the state, of 553 copies of volume 32, and payment therefor upon the 2d day of October, 1865. This proof was rejected, and exception was taken to the ruling of the court. This sale fixes the date of publication at least as early as October 2, 1865. The memorandum attached to the clerk's certificate, concerning the filing of the title of volume 32 (page 498), even if competent proof, only tends to show that the printed volume was not deposited until January 17, 1866, which was more than three months after the date of publication, viz., October 2, 1865, as shown by the certificates of the Auditor and Secretary

of State, certifying the purchase of 553 copies from the reporter on that day. As to volume 32, therefore, there can be no pretence of a valid copyright.

We also offered in evidence (page 511) similar certificates from the Auditor of Public Accounts and the Secretary of State, showing the purchase of 553 copies of volume 34, and payment therefor on October 23, 1866. This testimony was objected to, but admitted by the court, and exception was taken to such ruling. The clerk's certificate offered by appellee (page 499), purports to show the filing of the title of volume 34 in the clerk's office October 23, 1866. The memorandum at the bottom of this certificate, even if competent proof of the date of the deposit of the printed volume, only tends to show that it was deposited on the same day, viz., October 23, 1866. Upon the same day, at Springfield, Illinois, 200 miles distant from the office of the clerk of the District court in Chicago, 553 copies of volume 34 were sold to the state, such sale being the highest and best evidence of publication. It is thus apparent that the filing of the printed title, the publication of the volume by its sale at Springfield, 200 miles distant, and the deposit of a printed copy of the book with the clerk, in Chicago, were simultaneous acts, and did not follow each other in the sequence prescribed by the act of Congress, which required the filing of the title in advance of publication, and the deposit of the printed volume thereafter. Appellee's title, therefore, wholly fails as to volume 34.

The learned judge of the Circuit court, in his opinion, could find no means of escape from these objections, as to volume 32, other than to assert that the sale to the state was not a publication within the meaning of the statute, and that, as to volume 34, he would indulge the

generous presumption that the filing of the certificate of title preceded the deposit of the volume with the clerk. Whether it preceded or followed the publication, the three acts all appearing to have occurred upon one and the same day, he did not, and, indeed, from the record, could not, determine.

The undoubted fact, as to volume 34, is that no printed title was ever filed in advance of publication, or separate from the deposit of the printed volume itself. In other words, the first deposit made with the clerk of the District court, as to volume 34, was the deposit of the printed volume complete. The publisher seems to have wholly forgotten or omitted to file the printed title until after publication, when he probably deposited the volume itself, which was the only step ever taken toward copyrighting this volume. This fact will be apparent to the court if it will take the trouble to examine the original copyright records of the clerk of the District court of the United States, for the Northern District of Illinois, now deposited with, and under the custody of, the Librarian of Congress, under the act of Congress of 1870, regulating copyrights.

That the sale of volume 32 and 34 to the state was a publication, scarcely needs argument. It was literally a making public of the volumes in the fullest sense of the term. Had proof been offered of the sale of a single volume from appellee's store, to a member of the profession, or even of the offering of a single copy for sale, that would have been sufficient evidence of publication. Instead of this, we proved a sale to the state of 553 copies under a statute providing for the purchase and distribution, by the state, of these copies, and yet the learned judge held that this afforded no evidence of

publication. In this view of the case, he wholly ignored the statute under which the volumes were sold to the state. The sale was under the provisions of sections 22, 23 and 24 of chapter 29 of the revised statutes of 1845, which provided as follows:

"SECTION 22. It shall be the duty of the reporter to deliver to the secretary of state, as soon as convenient after publication, such number of copies of the respective volumes of the reports of said court, as may be necessary to enable the said secretary to distribute the same in the manner provided in the following section, with 100 copies in addition, to be deposited in the secretary's office for the use of the state.

"SEC. 23. It shall be the duty of the Secretary of State to distribute the said reports in the manner following, to wit: he shall deliver one copy to each of the justices of the Supreme court; one copy to the Attorney General, each States attorney, to each clerk of a court of record in this state, except the Supreme court; one copy to each Probate justice and five copies to the clerk of the Supreme court; one to the executive of each state in the United States, and five copies to the executive of the United States; and one copy to each of the officers of the executive department of this state, who are required to keep their offices at the seat of government.

"SEC. 24. Upon the delivery of the requisite number of any volume of said reports, it shall be the duty of the Secretary of State to deliver to said reporter a certificate, specifying the number of copies of said reports which shall have been delivered to him, and on presentation of said certificate to the auditor of public accounts, he shall issue his warrant upon the treasurer for such an amount as said volumes shall amount to, at the price for which said books shall be sold to individuals; provided said price shall not exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer and secretary of state."

By the act of February 8, 1865, Public Laws of Illinois of 1865, page 103, heretofore quoted on another branch

of the argument, the price to the state of all volumes, beginning with 31, was fixed at $6. It is impossible to conceive of a more complete or effective publication of the volumes, than their sale to the state for the purposes enumerated in the foregoing statute. It will be observed, also, that by the language of section 22, above quoted, it is provided that the reporter shall deliver the copies to the Secretary of State "as soon as convenient after publica-"tion." The statute itself thus recognizes the fact that publication has preceded the sale to the state, even if there were any doubt upon the point that such sale alone constituted sufficient evidence of publication.

For these reasons, therefore, appellee wholly failed to establish any copyright, or right of action, as to volumes 32 and 34, and the decree as to these volumes should be reversed, wholly irrespective of any and all other questions in the case.

The sixth assignment of error pertains to the relief granted as to volumes 35 and 36. By the clerk's certificate, offered by appellee as to volume 35 (page 500), it appears that the printed title was deposited with the clerk of the District court, January 28, 1867. The act of Congress then in force, like the present statute, required a notice of the entry of the copyright to be printed, either on the title page of the volume, when published, or on the succeeding page. The printed notice, which appears on the back of the title page of volume 35 of the original edition as published, purports to show its entry in the year 1866, being in the following words:

"Entered according to act of Congress in the year 1866."

There is, therefore, a variance of a year in the filing of the title, as shown by the clerk's certificate, and in the

announcement of the fact, as shown in the printed notice on the reverse of the title page. As to volume 36, the clerk's certificate, (page 500) shows that the printed title was filed by E. B. Myers and Chandler, while the printed notice on the reverse of the title page of the volume as published purports to show that the entry was made by E. B. Myers alone. The authorities already cited as to the necessity of a strict compliance with all the statutory provisions, apply with equal force to the objections now made as to volumes 35 and 36. The printed notice of the entry, upon the reverse of the title page, is one of the three indispensable conditions required by the act of Congress, to the creation of a copyright, without a literal and strict performance of which there can be no right acquired under the statute.

The case of *Baker* v. *Taylor*, 2 Blatchf., 22, is exactly in point, the case turning on a similar mistake of a year in the printed notice of entry. The bill alleged the deposit of the title and delivery of the book to the clerk, November 10, 1846, and the imprint on the page succeeding the title-page of "Entered according to the act of Congress, in the year 1847," the bill alleging that the year 1847 was printed by mistake for 1846. The injunction was refused, Betts, J., observing, page 84:

"I think the point is placed beyond question, that the failure, in the present case, to publish the notice demanded by the act, in the manner directed, creates a fatal defect in the plaintiffs' title. Even though the failure to publish the statutory notice arose from mistake, this court would have no power to accept the intention of the party, in place of a performance, any more in respect to the insertion of that notice on the proper page, than in respect to the deposit of the title of the book. But there was no mistake in this case. The plaintiffs knew of the error before the book was published. They, however,

regarded it as trivial, and not worth the expense and trouble of correction. But Congress, in the 5th section of the act of 1831, have seen fit to make the copyright dependent upon the particular act of giving the notice, and, to mark its importance, the statute sets forth the words in which the notice shall be given. The direction must be strictly complied with."

The learned judge of the Circuit court, in passing upon our objections for want of compliance with the conditions of the act of Congress, frankly admitted that he could not agree with the strict construction which had been placed upon the statute by the courts. With equal frankness he gave as his reason for refusing to follow the general current of authority upon this point, that there was still an inherent or natural property right in the author. And because of this right, he was disposed to give a much more liberal construction to the statute than had been given by other courts. That we may do him no injustice, we quote from his opinion, (page 35) as follows:

"It may be admitted, therefore, that every person who claims a copyright to a book conferred by act of Congress, must show that the provisions of the act have been complied with. But there is what may be called the original right of the author. It is the object of the acts of Congress to 'secure' the right which thus primarily exists. Indeed, statutes of copyright seem to imply the existence of a natural right of the author to the product of his brain. They are passed in order to make that right after publication, in the language of the Constitution 'exclusive.' So that I am not inclined to agree with the strict construction which has been placed on the acts of Congress by some of the courts. It seems to me, on the contrary, that these various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work."

Unfortunately for the logic of the learned judge, the

inherent or "natural property theory" of literary property no longer prevails in the courts, and the author must look only to the statute for his protection, and must show a strict compliance with all its requirements. Tested by ordinary rules of property, and by ordinary standards of right and wrong, the "natural property theory" is well founded and should receive the sanction of the courts. It was so held in the great case of *Millar* v. *Taylor*, 4 Burr., 2303, in 1769, and the opinion of Lord Mansfield in that case remains as a most masterly exposition of the natural right of the author to his literary product, independent of the statute of Anne. But in the case of *Donaldson* v. *Becket*, 4 Burr., 2408, decided in 1774, the House of Lords overruled the doctrine of *Millar* v. *Taylor*, five of the law lords being of the opinion that the statute of Anne did not deprive the author of his common law right, while six held that the common law right, after publication, was taken away by the statute, and that the author must look to the statute alone for protection. It is a well-known historical fact that Lord Mansfield refrained from voting upon the question in the House of Lords from motives of delicacy, and that his vote, if given, would have left the law lords equally divided upon this question, thereby affirming the doctrine of *Millar* v. *Taylor*. Upon this slender margin, therefore, the doctrine was established by the House of Lords, that the natural property right of the author, after publication, is wholly lost, and that he must look to the statute alone for protection. This doctrine has ever since remained unshaken in England, and it received the express sanction of this court in *Wheaton* v. *Peters*, and has ever since been followed in this country. We are, therefore, no longer dealing with abstract questions of literary

property, or with any ethical considerations as to the dominion of the author over the product of his own brain. We are merely dealing with questions of statutory construction, which have long since been determined by the highest judicial tribunals of England and America. And in view of the doctrine of the House of Lords, in *Donaldson* v. *Becket*, and of this court in *Wheaton* v. *Peters*, it is too late to assert the existence of any inherent or natural property right upon the part of the author, after publication. With the policy or justice of this state of the law we have no present concern. Such considerations might properly be addressed to the legislature, as affording reason for a change in the existing law, but until such change is made by express legislation, the doctrine of *Wheaton* v. *Peters*, and of the long array of authorities already cited, requiring strict compliance with all the conditions of the act of Congress, must prevail. And because of the absolute failure of appellee to prove such compliance with the conditions prescribed by the act of 1831, the decree should be reversed.

III.

Appellee wholly failed to prove Title to any of the volumes, as averred in his Bill.

The seventh error assigned is based upon the failure of appellee to prove any assignment or transfer by Mr. Freeman, the reporter, of his interest in any of the volumes to appellee, or any assignment or transfer by Horace P. Chandler to appellee, of the alleged interest of Chandler in volumes 32 to 38, or of any source or means through which appellee derived title to any of the vol-

umes. The scope of this objection may be better understood by a brief reference to the pleadings.

In his original bill of complaint (page 2), appellee avers the existence of a partnership between himself and Horace P. Chandler, under the firm name of E. B. Myers and Chandler, between the years 1865 and 1868, the firm being engaged in the business of publishing law books in the city of Chicago. The bill avers that the firm were the proprietors of each of the volumes 32 to 38, inclusive, and that the firm deposited the printed titles of each of the volumes and also deposited printed copies of the volumes, after publication. It is also averred (page 4), that all of the books were prepared by Mr. Freeman, from whom the firm of E. B. Myers and Chandler purchased all his proprietary right, paying him a large and valuable consideration therefor, in consideration of which payment Freeman agreed that the firm should have the copyright of the books. The bill alleges (page 5) that on June 13, 1868, Chandler sold and assigned to appellee all his right, title and interest in the volumes and copyrights, by a written assignment, duly acknowledged and filed for record in the office of the clerk of the District court of the United States for the Northern District of Illinois, June 18, 1868, and duly recorded in the copyright records of the court, volume No. 3, pages 407 and 408, by virtue of which assignment, it is averred that appellee became the proprietor of the copyright of those volumes, and that he alone was and is authorized to publish them. The bill then alleges (page 5), that appellee was the sole proprietor of the remaining volumes, viz.: 39 to 46 inclusive, which he entered in his own name; that each of these works was prepared by Freeman (page 7); that appellee purchased

from Freeman all his proprietary interest therein, paying him a large and valuable consideration therefor, Freeman agreeing that appellee should have the copyright of the books.

As to all of the above averments of the bill, concerning the interest of the firm of Myers and Chandler in these reports, the purchase from Freeman of his interest, the assignment by Chandler to Myers of his interest in volumes 32 to 38, the alleged agreement as to the right to copyright the volumes, and the payment by appellee to Freeman for his services in the preparation of volumes 39 to 46, the answer of appellants (page 16) avers that they have neither sufficient knowledge nor information to admit or deny such allegations, and therefore they put appellee upon strict proof.

A distinct issue having thus been tendered by appellee, both as to the source of his alleged title and as to the chain of title, and appellee having, by our answer, been put upon strict proof as to these material and vital points, the burden was upon him to prove his title as alleged in his bill. The failure to make competent proof of such title is necessarily fatal to any right of action. Incredible as it may appear to the court, appellee offered no proof whatever upon any of the points upon which the issue was thus squarely defined. His entire proof of title consists of the clerk's certificates of the filing of the printed titles of volumes 32 to 46. No assignment, document, contract, or memorandum of any nature whatever was offered by appellee to prove the title averred by his bill to have been derived from Freeman, the reporter, or from Chandler, his former partner, nor was any parol proof offered upon this point, even if such title could have been established by parol.

The omission to prove title is the more significant when it is remembered that the act of Congress then in force limited the copyright, in terms, to the author and to his assigns.* Section 1 of the act of February 3, 1831, 4 U. S. Statutes at Large, 436, provided as follows:

"That from and after the passage of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, * * * and the executors, administrators or legal assigns of such person or persons, shall have the sole right and liberty of printing," etc.

Under this act, therefore, appellee could only maintain his action by proving an assignment by Freeman of his interest in volumes 32 to 38 to Myers and Chandler before these volumes were copyrighted, an assignment by Chandler of his interest in these volumes to Myers, and an assignment by Freeman of volumes 39 to 46 to Myers before the volumes were copyrighted. His counsel recognized this necessity in framing the original bill, evidently having then in mind the provision of the statute above quoted, and the bill contains allegations covering all the above points, and averring a derivative title in appellee to all the volumes. But the record will be searched in vain for any proof, either documentary or parol, in support of these averments.

No extended comment upon this branch of the case can emphasize the error of the court in awarding a decree upon this condition of the record. The mere statement of the omission to prove the title alleged in the bill is of itself the strongest argument which can be made upon this branch of the case, and for this error alone we confidently submit that the decree should be reversed.

* It was not until the Act of Congress of July 8 1870, R.S. 4952, that copyright was given to the "proprietor."

IV.

THE DECREE SHOULD BE REVERSED, BECAUSE OF APPELLEE'S ACQUIESCENCE IN THE PUBLICATION OF THE VOLUMES, AND BECAUSE OF HIS LACHES IN SEEKING RELIEF.

The eighth assignment of error is based upon Myers' acquiescence in, consent to and ratification of, the publication of the volumes by appellants, and his delay and laches in seeking relief. The facts upon this branch of the case are disclosed by the testimony of Andrew P. Callahan, Bernard Callaghan, Andrew Callaghan, George W. Beck and Mr. Myers himself. And because of the importance of this feature of the case, and the somewhat voluminous extent of the testimony upon which it rests, it has been deemed advisable for the convenience of the court to preface this branch of the argument with a synopsis of the testimony of the witnesses above named. The testimony bearing upon this point has been condensed into narrative form, with the exception of a few of the more material questions and answers, and an effort has been made to present it in as brief a compass as possible, consistent with clearness and with the importance of the facts embraced in the testimony of the witnesses. It is as follows:

Deposition of ANDREW P. CALLAHAN (page 131, *et. seq.*):

"Prior to 1876, Callaghan and Company owned the stock of volumes 2 to 18, inclusive, and the copyrights, or license to print volumes 2 to 30, inclusive; in February, 1877, we obtained the copyrights of volumes 1 and 31; at that time we acquired an interest from Mr. Freeman in

volumes 47 to the end of the series. The arrangement included our right to sell these volumes at a discount to the trade, and the prohibition on Mr. Freeman to sell them to the trade at less than $3.50 a volume; it substantially gave us control of the trade. From 1871 to 1876 and 1877, volumes 32 to 38 were entirely out of print and scarce, and could only be had at second hand, as they could be picked up from one source or another. During all this time there was a continuous demand from the profession for them; there was a greater demand in 1877 in the aggregate than in any previous year, and it was being continually added to. We talked of the republication of 32 to 38 to Myers several times in 1876, I think as early as the spring; certainly as early as the summer of 1876. In November, 1876, we had made up our minds to commence soon, almost immediately, the reprinting of these volumes; we had this project in mind for quite a long time. At that date we had determined to commence almost immediately the reprinting of them.

"In November, 1876, I went to his (Myers') store for the double purpose of announcing to him our intention to reprint them, or to induce him to reprint those which were out of print, 32 to 38, inclusive; or, failing to do that, to sell his entire interest in the Illinois Reports to us. I asked him if he would reprint volumes 32 to 38; he said he would not; it would not pay him; he had sunk money in volume 46. He stated that he had reprinted volume 46 at a loss, and he had not got his money out of it yet, and he did not think that the market would afford a profit on the sale of 32 to 38. I then asked him if he would sell his interest in 32 to 46 to us; he did not know; asked what I would give. I offered him $5,000; the offer to include copyrights of 32 to 46, and plates and stock of 39 to 46; stock about 400 copies. 32 to 38 were talked of by Myers as out of print. He claimed that plates alone which he then owned from 39 to 46 were worth alone the sum named, $6,000. In the discussion I stated that no copyright was worth more than the cost of reproducing the books, and it was acquiesced in by him, but did not figure in the estimate. In the interview no value was attached to the copyrights of 31 to 38; the general impression was that it wouldn't pay to reprint them. Myers as-

serted no value in the copyrights at that interview. I stated the intention of the firm to reprint the scarce volumes, including 32 to 38. Myers made no objection of any nature to our proposed reprinting of 32 to 38 at that time, or at any other time; nor did he say that our reprinting of volumes 32 to 38 would be an infringement of his copyright. I understood him all along to desire us to reprint all those six or seven volumes, they not being profitable to print himself.

"The next interview was after our announcement of the publication of 1 and 19 to 38, in February, 1877."

(See advertisement in Legal News, February 24, 1877, page 169.)

"Myers said that he saw the advertisement. We had several interviews about the purchase of his interest in the reports, the amounts to be paid for them, and the fact that we were reprinting 32 to 38 was talked over between us. I made propositions to buy his interest in 32 to 46; offered him $5,000; he took the offer under advisement. I informed him at all of our interviews of our intention concerning the republication of 32 to 38. It had been published and was known to everybody.

"At an interview in March, I went to see Myers concerning an agreement to furnish complete sets of reports and to see what we could buy his bound volumes, 39 to 46 for. I said if we could buy his books at a reasonable price we would do so; but if he charged an unreasonable price for them we could not permit him to control the price of the set by charging a large sum for his 39 to 46, and would therefore have to reprint them. He said he would sell his 39 to 46 at the same price which we would charge for volumes 1 to 38; that is, our books. I will not state positively that he said 1 to 38, but he said our books. I replied that was not equitable, for the reason that our reprints cost us much more than his books, which were old and printed from stereotype plates, cost him. We did not agree."

"At this interview allusion was made by both parties to our reprints; by our reprints I mean 1 and 19 to 38. He desired we should sell all the first 38 volumes to him, everything that we proposed to control, or did control, 1 to 38. I stated to him that the time had come when an

arrangement should be made for offering complete sets for sale; that we were reprinting the scarce volumes, and desired to know what he would sell his 39 to 46 for, to complete sets; that I desired to obtain his 39 to 46 for the purpose of furnishing complete sets; that we intended to push their sale largely in other states than Illinois, and in order to do so we would have to sell at a low price; he had been informed of our arrangement with Freeman at that time. Afterwards Beck, our shipper, was sent to Myers to see if he could not make an arrangement to get his 39 to 46 at reasonable rates."

"In June a long conversation occurred between Myers, Bernard Callaghan and myself at our store. We stated to Myers that we desired to buy his copyrights and plates, his interest in the Illinois Reports; would give him $5,000 for his whole interest, 32 to 46 inclusive, less the cost already incurred in printing the volumes then either printed or printing. He declined, and offered to put in his volumes 39 to 46 at the same price we would put in 1 to 38 inclusive; that is, he would sell at the same price per volume 39 to 46 to us, at which we would sell to him 1 to 38. We declined for the reasons given in the prior interview. He then offered to sell his whole interest and we declined. At this time volume 32 of our reprints had appeared and Myers had bought a copy. The others from 32 to 38 were some in the hands of the printer, and some being edited. We informed Myers at that interview of the condition of the others; he made no objection or complaint of any kind concerning our re-publication of 32 to 38, and made no statement as to such re-publication infringing his copyright. He was apprised of the publication of each from 32 to 38, and purchased several volumes of them. We invested in 32 to 38 during 1877, about $8,000. There was almost daily communication between Myers' concern and ours, during 1876 and '7."

"I never saw Myers' circulars or had any information concerning the existence of such circulars until Myers' affidavit before the master in this case. I learned in August, 1877, first, that Myers contemplated republishing 37 and 38. I never heard any objection from Myers or his employes prior to the filing of his bill to our reprinting 32 to 38; the first knowledge or intimation I ever had of

such objection was when the bill was filed. Myers did not object in the interview in February when he spoke about the advertisement in the Legal News, to our reprint of 32 to 38.

"Q. What effect, if any, was produced upon your mind by these various interviews and conversations with Mr. Myers to which you have testified, as to the publication of volumes 32 to 38?"

(Objected to.)

"A. I was induced to believe that he wanted it done.

"Q. State whether in any of these various interviews you had with Myers of which you have testified, during 1876 and '7, he ever made any statement to you, of any intention on his part to print volumes 32 to 38 inclusive?

"A. I do not remember his ever having said so; on the contrary, I understood that he did not want to do it; he told me he did not want to do it, and would not do it at that time, because it would not pay.

"Q. In these various interviews and conversations which you have narrated with Mr. Myers, state whether the conversation was usually directed to volumes 32 to 38, or volumes 39 to 46 inclusive?

"A. The question at issue between Mr. Myers and ourselves was, whether we should reprint his volumes 39 to 46 or not; whether we should buy his interest, his entire interest in the Illinois Reports; or, ignoring his interest in the Illinois Reports, reprint 39 to 46, and so affect or destroy the value of his stereotype plates in 39 to 46."

"In the conversations the main subject of discussion was 39 to 46, and our reprinting of them was the question at issue; 32 to 38 were never the subject of principal discussion; they were merely incidental. Myers never expressed any unwillingness, so far as I can recollect, to have us reprint 32 to 38 alone."

Deposition of BERNARD CALLAGHAN (page 173, *et seq.*):

"I had an interview with Myers concerning our republication of 32 to 38 of the Illinois reports at my store in the later part of June, 1877. A. P. Callahan, my partner, was present at most of it. I asked Myers to come

on that matter for the purpose of making some arrangement by which we could put complete sets of Illinois reports on the market to supply the demand. There was a good deal said by both of us. The substance was: we tried to make some arrangement by which we could complete sets, either by purchasing his volumes 39 to 46 inclusive, from him in quantities as we might want them, or by buying out his plates and copyright of those volumes, and thereby enable us with our own reprints to make complete sets. Myers said he would sell us his volumes that he had stock of, 39 to 46, for the same price we would charge him for our reprints. I asked what he meant by our reprints; he said he meant all our reprints.

"Q. Was anything said about your reprints of 32 to 38 by him or you?

"A. Yes, sir; that was to include the reprints of 32 to 38, inclusive. We stated to him that it would be unreasonable for him to expect us to do what he proposed; he could manufacture for about $1 a volume, or less, and our reprints would not pay for a long time to come; we could not put them at the same price as books that could be manufactured from those plates which had paid for themselves already, and all future books printed from which would be clear profit. Nothing was agreed on, but he made the offer to sell his entire interest, including his assumed interest in 32 to 38, and the plates, stock and copyrights of 39 to 46, to us for $7,000. We offered him $5,000, less the amount already paid out in re-editing 32 to 38, inclusive. That proposition he took under advisement. In that conversation he stated that he did not care what we did with 32 to 38; what he cared about was 39 to 46, of which he had stock and stereotype plates.

"We stated to him in this interview the amounts we had paid for some of the volumes 32 to 38, and told him how many volumes were under way, the state they were in, how far they had progressed, and that perhaps, if we concluded an arrangement then, we could get some of our editors to let up on our contracts with them, and would therefore be able to give him nearer the $5,000. At that time several of the volumes 32 to 38 were under way, being printed and edited, the editing of all contracted for. I

explained all about the condition of those volumes to Myers pretty fully; told him the condition as near as I could without getting the exact facts from the printers. The interview lasted perhaps three-quarters of an hour.

" In this interview Myers said nothing about his intention to reprint 32 to 38; he had told us that he would not reprint them; that it would not pay to do it; it was so well understood between him and us that the last part of the time we did not talk to him about it, nor he to us. He gave us to understand after the fire he would not reprint them. After the fire of 1871 we applied to Myers for volumes between 31 and 39, he being the publisher; he told us he could not furnish them. Volumes 32 to 38 could not be supplied from 1872 to 1877, except by picking up second-hand copies; they were selling at very large prices in any shape we could get them. I never learned that Myers intended reprinting any of 32 to 38 till I think he had one volume out in the summer of 1877. The first intimation I had, I got from the printing office. We had a quarrel with Bradwell over it; he got us to let up on our work, and we afterwards learned that it was for the purpose of printing either 37 or 38 for Myers. There was frequent communication back and forth between Myers and our firm, getting books from each other, for the last 4 or 5 years, and through the year 1877.

" Q. State whether at any time prior to filing the bill in this case Myers, or any one in his behalf, ever made any objection to the firm of Callaghan & Company against the publication of volumes 32 to 38?

" A. They did not, he or any of them, to my knowledge, either directly or indirectly; neither Myers or his employes, or any person for him ever made any objection concerning the infringement of his copyrights by our publishing 32 to 38. Mr. Myers said to me himself that he did not care what we did with 32 to 38; what he cared about was the volumes he had stock and plates of. Met Myers frequently during 1876 and 1877, and have met frequently during the course of business in the last 5 or 6 years; our places of business are about two blocks apart. The first knowledge or intimation I ever received, directly or indirectly, that Myers objected to our republishing vol-

umes 32 to 38, was when he instituted legal proceedings against us; the marshal's subpœna was the first intimation I had of it.

"The effect of our republishing 32 to 38 in 1877 would be decidedly beneficial on Myers' volumes 39 to 46, by creating a market for them and enabling he and us to put sets on the market which would embrace his eight volumes, and this fact was mentioned in the interview. He understood it of course."

Cross-examination of BERNARD CALLAGHAN (page 184, *et seq.*):

"My object in having this June interview with Myers was to enable us to buy from him volumes 39 to 46, or to make an arrangement which would enable us to put complete sets upon the market, and enable him to do the same thing, by purchasing or exchanging with him, the exchange to be on a cash basis, that is, we would pay to him and he to us. We did not desire to make arrangements in regard to any other volumes of Myers except 39 to 46. I always understood that Myers claimed a copyright in 32 to 46. Do not think we asked his consent to reprint 32 to 38; I recollect asking him to reprint those volumes, and he said he would not. I did not think he would raise any objections to our reprinting them, as it was in his interest; think he would have been glad that we should have reprinted them, provided we had stopped at 39.

"In the June interview, in talking with Myers, I asked him what reprints were referred to, and he answered, 'all our reprints.' I now mean to say that it included the reprints from 19 to 38—all our reprints. I mean that Myers or myself named volumes 19 to 38, and the negotiation was on that basis, but I cannot state whether it was he or I that gave the numbers."

Re-direct examination of BERNARD CALLAGHAN (page 194, *et seq.*):

"There was no quarreling or bickering at any interview between us and Myers before the filing of the bill

concerning our republication of 32 to 38. In the June interview he did not attach any value to the copyrights of 32 to 38; he said he did not care what we did with those volumes; that he only cared about the volumes he had stereotype plates and stock of, 39 to 46."

Re-cross examination of BERNARD CALLAGHAN (page 195):

"In the June interview Myers said he did not care what we did with 32 to 38, and it made the impression on me that he did not attach any value to the copyright. I am not sure that the copyright of 32 to 38 was mentioned. What we were trying to buy most was his 39 to 46, and we offered to buy the copyrights of 32 to 46; we would have liked to have them all thrown in. We were to buy all his plates and stock and alleged copyright in all volumes including 32 to 46. I do not say that Myers said that he did not attach any value to the copyrights of 32 to 38, but when he said he did not care what we did with 32 to 38, the others were what he cared about, of course there was nothing else left for me to infer.

Deposition of ANDREW CALLAGHAN (page 196, *et seq.*):

"Had a conversation with Myers concerning our republication of 32 to 38 in 1877, at a restaurant on Dearborn street; we sat at the same table and ate our lunch together. Myers asked me the condition of our reprints, how far we had progressed, and when we expected certain volumes out. This was either June or July. I told him the exact state of the case as it was at that time, how far they were advanced, and when we expected them out. He made no objection whatever to our reprinting 32 to 38; the interview was very cordial.

"There was frequent communication between Callaghan & Company and Myers in the course of business, during 1877, and the subject of our reprinting 32 to 38 was frequently alluded to by Myers' employes, and as frequently discussed on our part, and the exact state of the case explained. They, on several occasions, asked as to when we expected certain volumes, and we answered correctly as to when we expected them. Such conversations were

held with myself and with our employes in my presence. The first time I ever heard of the circular attached to Myers' deposition was when it was produced on the hearing of the motion before Mr. Bishop in this case. We are brought in contact in our business with members of the legal profession from different parts of the state, and I never heard from them about any such circular. Prior to the commencement of this suit no objection was ever made, to my knowledge, by Mr. Myers, his employes, or any person in his behalf, to our reprinting 32 to 38, nor any statement as to our reprinting those volumes being an infringement of his copyright. I never learned that Myers objected in any way to our republishing 32 to 38 till he began this suit.

Cross-Examination of ANDREW CALLAGHAN (page 199 *et seq.*).

"My best recollection is that some of the volumes were out at the time of this conversation, but am not positive. The conversation was subsequent to the beginning of the work, and while they were in press, some of them.

"Myers' inquiries of me at that time had no reference to volumes between 19 and 30. The volumes in dispute were the ones we were speaking of; they were 32 to 38. The conversation, as I recollect it, referred entirely to 32 to 38. I am certain I stated to Myers the numbers of the volumes we had in press at that time, and the conversation related to 32 to 38, and his inquiry and my replies had reference to those volumes.

Deposition of GEORGE W. BECK (page 286 *et seq.*):

"Am salesman for defendants; was in 1877. In March, 1877, was sent to Myers by A. P. Callahan to try to make some arrangement with Myers to purchase his volumes 39 to 46. I told him what I came for, and wanted to know at what price he would sell them. The first proposition he made was that he would sell them at the same price that we would sell our re-prints to him. That offer I declined, and we made an arrangement to take his at same price that we would furnish him Freeman's 47 to the end of the set, and we took several sets of his 39 to

46 under that arrangement. The arrangement lasted through March and April, I think; then Myers declined to go on and to furnish volumes at that price.

"In May I had another interview with Myers about the matter, and the substance was that he refused to sell us his volumes. I told him his course with regard to those volumes, 39 to 46, would compel Callaghan & Company to reprint them, as they had to have them in order to complete sets. He said. 'If they reprint my 39 to 46, I'll put a rod in pickle for them.' He said nothing whatever concerning the reprinting of 32 to 38 by Callaghan & Company.

"In the year 1877 the employes of Myers came to the store of Callaghan & Company; the employes of both stores were back and forth, I might say daily. Myers' employes when they came invariably inquired as to what condition the reprints 32 to 38 were in. By Myers' employes I mean Beckwith, one of his clerks, and his son, George L. Myers. When they made those inquiries they were always told as to what condition they were in, when a volume would be ready. We gave them all the information we possessed at the time in regard to them.

"In the end of April or May I had a conversation with George Myers at Myers' store. We talked back and forth on the subject of reprints of 1 and 19 to 38, inclusive. We made a wager that they would not all be out on the 4th of July. George did not at that time make any objection to the reprinting of any of those volumes by Callaghan & Company, and in any of the various interviews between Myers and myself and the employes of Myers and myself, I never heard from any of them an objection to the reprinting of these volumes. The first I learned that Myers objected to the reprinting of these volumes, by Callaghan & Company, was when this bill was filed.

Cross-Examination of GEORGE W. BECK (page 291):

"Q. At the time Mr. Myers told you if Callaghan & Company undertook to publish his volumes, and he said if they published them he would put a rod in pickle for them, do you undertake to say that he then undertook to enumerate the volumes that he said he would prosecute them for publishing?

"A. Yes, sir.
"Q. You swear that he named 39 to 46?
"A. Myers' 39 to 46.
"Q. You are positive about that?
"A. Yes, sir.
"Q. That was the conversation in his store?
"A. Yes, sir.
"That was the only conversation in which I heard Myers say he would prosecute them, or assert his copyright claim.

Re-direct examination of GEORGE W. BECK (page 292):

"In the wager I had with George Myers as to when Callaghan & Company's reprints would be out, the reprints mentioned were our announced reprints; by announced reprints I mean volumes 1 and 19 to 38.

Deposition of EUGENE B. MYERS—Cross-examination (pages 115, 116):

"Q. Don't you know as a matter of fact, that one of their reprints had already appeared, prior to the June interview?
"A. I believe the 32nd was published.
"Q. Had not you seen it and purchased a copy of it prior to this June interview?
"A. I purchased a copy as soon as I found it was issued.
"Q. Did not you purchase copies of their reprints from time to time, as fast as they were issued?
"A. I did, for the purpose of comparing them.
"Q. Then your best recollection is, that prior to this June interview you had already bought a copy of 32, the first of their reprints which had appeared (prior) to the June conversation?
"A. I am not positive, but I think I had.
(The exact date of Myers' purchase of volume 32 as fixed by appellants' testimony was June 2.)

In the light of the foregoing testimony it is confidently submitted that appellee is estopped by his own laches and acquiescence from relief in equity. The record discloses that as early as the spring of 1876 he was distinctly apprised of appellants' purpose to reprint volumes 32 to 38. In November, 1876, he was again definitely apprised of that intention. In February and March, 1877, repeated interviews were had between the parties, in which the matter was freely canvassed, the negotiations having in view the common purpose of putting upon the market complete sets of Illinois Reports, as a condition to which end it was necessary that Callaghan and Company should republish volumes 32 to 38. Myers repeatedly announced to them, as he had repeatedly announced to members of the profession, that he would not reprint these volumes. His speech and conduct during all the continued negotiations, from November, 1876, to the final interview in June, 1877, encouraged appellants in their proposed republication, and led them to believe that their enterprise had his full and free consent. "I understood him all along," says Andrew P. Callahan, in his deposition, "to desire us to reprint all these six volumes, or seven volumes, they not being profitable to him." Again, the witness is asked what effect was produced upon his mind by these various interviews with Mr. Myers as to the publication of volumes 32 to 38. Answer: "I was induced to believe that he wanted it done."

Bernard Callaghan testifies that at the interview with Myers in appellants' store, in the latter part of June, 1877, nearly a month after they had published, and Myers had bought, a copy of volume 32, Myers still endeavored to effect an exchange of his volumes 39 to 46 for their reprints, including 32 to 38, and adds: "He (Myers) stated

that he did not care what we did with 32 to 38 inclusive; that what he cared about was the volumes that he had stock and stereotype plates of, namely, 39 to 46." This, however, is denied by Myers (page 362).

Appellants' volumes appeared at the following dates in 1877:

May 31	volume	32
July 14	"	33
August 24	"	37
" 28	"	35
September 15	"	34
October 6	"	38
November 19	"	36

Myers purchased volume 32, June 2, 1877, and procured the others from time to time as they appeared. He was fully apprised of every step in appellants' republication. He saw their printed circular, announcing their reprint, as early as February or March, 1877, as he himself admits (page 110). His employes were frequently in appellants' store during the summer, with constant inquiries as to the condition of the reprints, and were as constantly informed of the exact status and progress of the work. He was personally informed, at the interview in appellants' store late in June, 1877, of the then condition of their volumes. He received, in person, like information from Andrew Callaghan, at the interview in the restaurant in June or July. His place of business was only two blocks distant from appellants'. He procured the volumes from time to time as they appeared, took the advice of counsel, believed them to be an infringement; and yet, astounding as it may appear to the court, he uttered no word of warning or complaint, until the filing

of his bill, December 17, 1877, six months and a half after the first volume had appeared and was in his possession.

During all this period the business relations of the two firms went on as before. Books were exchanged and sold between them; they and their employes came and went between the two places of business, and neither directly nor indirectly did Myers lisp a word of warning or remonstrance, until the work was completed, and appellants had invested $8,000 in their enterprise. As late as December 1, only sixteen days before filing his bill, he wrote to appellants as follows (page 170):

"CHICAGO, Dec. 1, 1877.

"*Messrs. Callaghan & Co.*

"GENTLEMEN: I have your note of this date, complaining because I charge you $5 per volume for my reprints of the Illinois Reports. My best answer seems to be, that you did a month ago, without notice, advance your price to me to $7.50 per volume on vols. 1 (Breese) to 38, inc. You also did, without notice or cause, advance your charge to full retail price for Moore's Justice. I have no right to question your mode of transacting your business, nor will I permit you to question mine.

"Resp'y,

"E. B. MYERS."

Six months have passed since appellants' first volume appeared; all of them have long been on the market, and yet the only complaint made by Myers is that he is charged too high prices—for what? For volumes 1 to 38 inclusive! Not a syllable of complaint as to the infringement, but only a pitiful whine that he is charged too much for what he now contends to have been stolen property. And all this on the very eve of filing his bill of complaint, over which and its well rounded periods,

charging piracy of his literary property, client and counsel were doubtless then consulting.

We beg the court to observe, that not only did Myers by his silence encourage Callaghan & Company to proceed with their publication and consequent large expenditure, but that he actively and openly encouraged such publication. Allusion has already been made to the negotiations in February, March and June, 1877, in which Myers proposed to co-operate with Callaghan & Company in the common plan and project of furnishing complete sets of Illinois reports by furnishing them his volumes 39 to 46, at the same price at which they would supply him their reprints, including 32 to 38. Equally conclusive proof of Myers' active co-operation in the enterprise is found in his printed trade circular dated March 1, 1877 (pages 329, 330). That circular, when it reaches the Illinois reports, enumerates the different volumes, and speaks of 19 to 38 in these words: "Illinois Reports (19 to 38) inclusive, reprinting." No price is given, plainly indicating that he had in mind Callaghans' reprint of these volumes, for had he himself been reprinting, he would have been able to fix a price for his own wares. No hint or allusion is made that he, Myers, is reprinting the volumes named. Indeed, he had no interest in 19 to 31, which were owned by Callaghan & Company, and the volumes enumerated in his circular as reprinting are Breese's Reports, and 19 to 38, the exact volumes announced by appellants in their advertisement in the Legal News of February 24th, which Myers admits was seen by him.

There is and can be no escape from the conclusion that, so far from announcing or intending to announce by this circular any intention on his own part to reprint volumes

32 to 38, Myers intended it as an announcement of the Callaghans' reprint, then under way, and thus sought to co-operate with them in bringing about the joint purpose of completing sets. Indeed, his own personal and selfish ends would be best subserved by their reprint, which he thus advertises. He had the printed stock and plates of volumes 39 to 46, for which he desired a market. Volumes 32 to 38 were out of print, and had been since the great fire. Myers himself had repeatedly refused to reproduce them, being unwilling to incur the risk and expenditure. He therefore encouraged the Callaghans in their proposed re-print, knowing that it would complete the series, and thus enhance the value of his own wares by increasing the demand for entire sets. And the conclusion is irresistible that in issuing this circular he had in mind the Callaghan volumes then in press, and that he himself then had no intention of reprinting.

It will be sought to break the force of this view by asserting that Myers did not intend to relinquish or abandon his property, and his testimony will be cited to the point that he intended to reprint the volumes in question, under the tri-partite agreement with Freeman, and Soule, Thomas & Wentworth, of St. Louis. As proof that this alleged intention of reprinting is a mere afterthought, attention is called to Myers' own letters to Freeman, shown as exhibits to the latter's deposition. Bearing in mind that the tri-partite agreement, if made at all, which is exceedingly problematical, was made in November, 1876, the court will not need to be reminded of the significance of the following extracts from Myers' letters to Freeman, written months afterward. February 16, 1877, he writes to Freeman (page 324):

"You said you would give me $6,000 for 32 to 46 Illinois, if the state purchased under the bill pending. I want to feel certain of that, if I am pushed by 'Cally' to accept or decline their offer; so please write to that effect."

April 25, 1877, he writes to Freeman, announcing in a burst of generous confidence (page 326):

"Confidentially, 38 is nearly ready. * * * They (Callaghan & Company) are making tremendous efforts to sell—are contracting full sets and guaranteeing to supply the balance within three months for $125. Jennings, of Banks & Bros., of N. Y., was here. We had a talk over the matter of my selling. I suggested that you might sell, and advised him to visit you, and he said he would. Has he reported yet? He is very anxious to get a hitch in on them to hurt 'Calla,' and I wish him luck. If I can see any profit or get sufficient patronage for 32 and after, I shall put them out as rapidly as possible."

It is thus apparent that as late as February 16, 1877. Myers, so far from intending to reprint, is endeavoring to sell the entire property, and is playing Freeman against the Callaghans in a coy and gentle dalliance between the two to enhance the price of his wares; and that, as late as April 25, 1877, he is negotiating with Jennings to sell and only speaks of reprinting "32 and after," if he "can "see any profit or sufficient patronage." Weighing these letters in connection with his printed circular of March 1, 1877, in which he virtually and unmistakably announces the Callaghan edition of volumes 32 to 38, the court is enabled to give proper weight to Myers' *ex post facto* assertion of an intention to reprint the volumes in controversy.

His complete and utter abandonment of volumes 32 to 38, and of all intention to reprint them, is shown by his yearly catalogues, in evidence, the originals of which are

by stipulation now before this court, covering the entire period from the great fire of 1871, to the year 1877. In each of these catalogues these volnmes are printed without any price annexed. At page 14 of the catalogue of 1873, defendants' Exhibit H, in the list of Illinois Reports, he omits volumes 19 to 38 entirely. At page 14 of the catalogue of 1874, Exhibit I, he makes a similar omission. At page 13 of the catalogue of 1875, Exhibit J, he inserts volumes 19 to 38, but with no price annexed. At the end of each of these three catalogues he advertises, offering a liberal price for the scarce volumes. In his catalogue for 1877, months after he would have us believe that he had entered into the tri-partite treaty with Freeman and Soule, Thomas and Wentworth to republish, he still announces volumes 19 to 38 without price. (See defendants' Exhibit K., pp. 15 and 48), and on the last inner and outer pages of the cover, he announces his ability to furnish only volumes 39 to 78. No mathematical demonstration can be clearer than that Myers' pretense of an intention to reprint volumes 32 to 38 is a mere afterthought, and that he intended the circular of March 1, 1877, as an announcement of Callaghans' volumes 19 to 38.

In view, therefore, of the entire course of conduct on the part of Myers, embracing not merely a tacit acquiescence in the Callaghans' publication, but affirmative aid and active encouragement, until they had embarked a large amount of capital in their enterprise; and in view of his unpardonable and unaccountable laches and delay for a period of many months before invoking the aid of the court, it is submitted that he is estopped by his own conduct from the relief sought by his bill, and that the decree should be reversed. And in support of this proposition,

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the attention of the court is directed to the following authorities:

Saunders v. *Smith*, 3 Myl. & Cr., 711.
Beard v. *Turner*, 13 L. T. R. N. S., 746.
Lewis v. *Chapman*, 3 Beav., 133.
Tinsley v. *Lacy*, 1 Hem. & M., 747.
Chappell v. *Sheard*, 1 Jur. N. S., 996.
Rundell v. *Murray*, Jac., 311.

Saunders v. *Smith*, 3 Myl. & Cr., 711, is directly in point, and there is a striking analogy between the general features of that case and the case at bar. It was a bill to enjoin the publication of the first part of the second volume of Smith's Leading Cases, because of an alleged infringement in the use of certain cases contained in volumes owned by complainants. The first volume of defendants' book had appeared in 1837, and complainants gave as an excuse for taking no steps to prevent the sale of that volume, that it only contained one entire case and parts of two others from their books, and that they did not consider that such an infringement as to warrant proceedings. The first part of the second volume, which alone was sought to be enjoined, was published by defendants, May 12, 1838. Complainants had no knowledge of its contents until May 19, when they immediately complained of the piracy, gave instructions for instituting legal proceedings on the same day, and on May 21, their solicitor wrote to one of the defendants, giving formal notice that defendants' work was an infringement, and that complainants would take immediate proceedings to protect their rights. The bill was filed May 29, 1838. It appeared that negotiations had been had, prior to defendants' publication, very similar to those which were had between Myers and the Callaghans in this case, and in a catalogue

published by complainants early in 1838, the first volume of the work appeared among the books sold by them, with a note announcing: "A second volume is in press."

Vice Chancellor Shadwell refused the injunction, and the motion was then renewed before the Chancellor, Lord Cottenham, who sustained the rulings of the Vice Chancellor, and refused the injunction. Lord Cottenham says, page 733:

"According to what was stated in the preface to the first volume, and according to what was communicated to them (complainants) by Mr. Smith, they knew that the first volume was merely the commencement of the plan, and that it was intended to bring it down to more modern times, in the reports in which the plaintiffs were more immediately interested. They do not complain, however; and there is nothing before me to show that they interfered, after the publication of the first volume, to caution Mr. Smith against interfering with their rights. On the contrary, I find, by an affidavit made by Mr. Maxwell, a statement of a communication between himself and one of the plaintiffs, after the publication of the first volume, and which is not met by any affidavits of the plaintiffs in reply. Mr. Maxwell, in his affidavit, which was sworn on the 31st of May, says that two or three months ago 'he mentioned to the said plaintiff, William Benning, that he understood that the plaintiffs were desirous of having a share in 'Smith's Leading Cases,' and that the deponent was willing to grant the same, provided that they would give him a proportionate share in 'Smith's Commercial Law' in exchange; and though the said plaintiff, William Benning, stated his partner would not accede to such a proposition, he made no complaint or observation to the deponent as to the publication of 'Smith's Leading Cases' in any way interfering with any copyright of the said plaintiffs.'

"Now this communication took place when the first volume had been published eleven months, and after the first part of the second volume had not only been announced, but had been included in a catalogue published

by the plaintiffs themselves. Can it be supposed that their attention was not drawn to the fact, not only of what had been done, but of what Mr. Smith announced his intention of doing? * * * I find the first volume published, announcing the intention of going on with the same plan, which necessarily would run over the period to which the copyright of the plaintiff relates, and that no remonstrance is made to Mr. Smith upon the nature of the work, but he is permitted to go on with his laborious undertaking until the period at which the first part of the second volume is published. In the meantime there was a communication between the plaintiffs and Mr. Maxwell, who was interested in the publication of the work, and who has as much right to the protection of the court as Mr. Smith; and in the proposal which he makes to the plaintiffs, he deals with the work as property he is entitled to deal with, wishing to make it the subject of arrangement between himself and the plaintiffs; and I do not find that this leads to any caution or interference on the part of the plaintiffs as to that course which Mr. Smith had pursued in part, and which the plaintiffs must have been fully aware that he intended to pursue farther.

"I do not give any opinion upon the legal question. I am only to decide whether the plaintiffs are entitled, under the circumstances, to the interposition of the court to protect their legal right, when that legal right has not yet been established. But I assume the existence of the legal right, and I say, that whatever legal right the plaintiffs may have, the circumstances are such as to make it the duty of a court of equity to withhold its hand, and to abstain from exercising its equitable jurisdiction, at all events until the plaintiffs shall come here with the legal title established. In doing this I am only doing what Lord Eldon did in *Rundell* v. *Murray*, and what is very generally done upon questions of patent right."

The same doctrine was recognized in *Tinsley* v. *Lacy*, 1 Hem. & M., 747, by Vice-Chancellor Wood, who uses this language:

"As was urged in *Campbell* v. *Scott*, acquiescence in the piracy of a portion of a work might embarrass proceedings to prevent a more extensive appropriation; and it

is, therefore, of the utmost importance to authors to come at the earliest possible stage to obtain the protection of the court against the violation of their rights of property."

Chappell v. *Sheard*, 1 Jur. N. S. 996, was a bill to enjoin the publication by defendants of a song which was alleged to be an infringement of plaintiffs' copyright. Defendants' song was published April 14. One of the plaintiffs made affidavit that he had no knowledge of it until June 10th of the same year. The bill appears to have been filed August 2. Vice-Chancellor Wood required additional proof as to plaintiffs' want of knowledge of defendants' publication. He says:

"There must be a further affidavit on the point of knowledge by any of the partners. It appears strange that this imitation should have been out so long ago as the 14th of April, and the managing partner of the plaintiffs not be aware of it until June; and if it turn out that he was aware of it all the time, such laches would be very important.

"The principle is this—that if the owner of the copyright suffers one depredation to go unchallenged, the court will not allow him to call another's infringement in question. Plaintiffs have to purge themselves from the imputation of laches; but the onus of proving laches is on the defendants; they must show a clear knowledge in the plaintiffs of the former infringements, and of their having put up with them for a length of time, if they wish to fix the plaintiffs with the consequences of that laches, so as to prevent them from having protection against any other depredations."

Lewis v. *Chapman*, 3 Beav., 133, was a bill to enjoin the publication of a topographical dictionary of England. The two works were preparing for publication at the same time, and defendant's was completed six and a half years before the bill was filed. For more than a year before the filing of the bill plaintiffs were in possession of a complete copy of defendant's work, which they had

obtained for purposes of comparison. Lord Langdale refused the injunction, saying, page 134:

"The delay of the plaintiffs is accounted for by reasons which affect them and which relate to their own convenience only. In the consideration of the case I have seen no reason to doubt the plaintiffs' copyright; and upon the examination of the exhibits I have found reason to think that in the preparation of Mr. Gorton's 3d volume considerable use was made of the plaintiffs' work; and although the small extent to which the plaintiffs from time to time made themselves acquainted with the contents of the defendant's work may in point of fact be entirely true, yet it appears to me that the plaintiffs, having so strong an interest in the subject, having such powerful motives for vigilant attention, and having such means of information, can not be allowed in a court of justice to state that they remained ignorant of that which they had the perfect means of knowing, and which it was their avowed purpose as well as their strong interest to learn; and under the circumstances I think it my duty to impute to them such a knowledge of the contents of the defendant's work as made it their duty to apply for an injunction, if at all, at a much earlier period. And on the ground of delay, and not for any other reason, I think that the injunction moved for must be refused."

Beard v. *Turner*, 13 L. T. R. N. S., 746, was a bill to restrain the infringement of a trade-mark in certain needles, and for an accounting of sales and profits. Complainant had seen and examined defendant's label two years prior to the filing of the bill. The bill was dismissed because of laches. Vice Chancellor Wood uses this language, page 740:

"The principles laid down are well known; first, if you induce another to lay out money by keeping back a right, which you intend at some future time to assert, you may induce him to incur serious expenditure. That was the well known case before Lord Hardwicke. Where I was wrong in the photograph case

was, that in that case there was a slight expenditure. If it had been the building of a house instead of a photographic studio, I have little doubt that the conclusion would have been otherwise. If you allow considerable expenditure to be made, you are not allowed afterwards to question the title of the person who has made that expenditure. But that rule would not apply to the case before me. I should not consider the making of these dies to be an expenditure of that kind.

"But suppose you wish to profit by that act of which you say you have a right to complain, and shall at some future period complain of; then I apprehend this court will say, you must come here at once; for this reason, that you ask in the bill for an account of the profits made by this gentleman upon the sale of these goods. The plaintiff may say: 'It may answer my purpose to let the defendant go on selling four or five years, and then at the end of that time to say he is my salesman, and I come for my account of profits.' I know of no instance in which the court has given relief with reference to a trade-mark except on a prompt application. By not complaining at the time when you might complain, you are lying by, the man continuing to use your property with the hope (and such is the prayer in your bill filed two or three years afterwards,) of obtaining those profits which you stood by, allowing him to make under this designation, without apprising him of your intention to make any such use of it. On that ground it falls within the principle enunciated by Lord St. Leonards in the Irish case referred to, in which it is stated that it is a fraud to allow a plaintiff to avail himself of delay to obtain benefit for himself. In that case you will not grant him relief."

This doctrine finds further support in the following cases:

Webb v. *Powers*, 2 Wood. & Min., 523.
Platt v. *Button*, 19 Ves., 447.
Baily v. *Taylor*, 1 Tamlyn, 295.
Johnson v. *Wyatt*, 11 Weekly Reporter, 852.

It is a fair and, indeed, a necessary inference, from the testimony, that Myers not only negligently allowed Callaghan & Company to go on and invest their money in the publication of volumes 32 to 38, but that he intentionally so conducted himself as to lead them on into an expenditure of which he hoped, in the end, to reap the benefit. On what other theory can his delay in filing his bill in this case be satisfactorily explained? Or his failure to inform the trade and profession of any intention on his part to publish any of the volumes from 32 to 38? Or his manifest anxiety to keep from the public the fact that he was reprinting volume 38? In his letter to Freeman, of April 25th, two months after the Callaghans' public announcement of their reprints, he writes, "Confidentially, 38 is nearly ready." Is it not manifest that he was trying to so steer his course, that while he lured appellants on by his actions and his conversations, to publish 32 to 38, he was using all caution to keep from them the knowledge that he was reprinting any of the volumes himself. He would make an investment of a few hundred dollars in order to strengthen his legal position in his then contemplated proceeding in this court to obtain a forfeiture to himself of all the copies of volumes 32 to 38, which he by his conduct decoyed appellants into printing at an expense to them, as he well understood, of eight thousand dollars or more.

"If one acts in such manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the fraudulent party will be restrained from asserting his right."

Devereux v. *Burgwyn*, 5 Iredell Eq., 351.
(Page 355.)

"The general principle now is, that where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting to the prejudice of that other the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted."

Hill v. *Epley*, 31 Pa. St., 331.

Appellee, by his refusal to reprint volumes 32 to 38; by his declarations to appellants and others that it would not pay to reproduce them; by his statements to appellants, during the negotiations with them, that he did not care what they did with reference to those volumes; by his attaching to the copyright in them a mere nominal value; by his proposal to them to exchange his volumes 39 to 46 for their reprints; by his purchase of these reprints as they came out; by his general course of speech and conduct, so far as he made that course known to Callaghan & Company, from their interviews in November, 1876, down to the day of filing his bill in this cause—encouraged the expenditure of their money in the reproduction of these books, to just such an extent as brought into actual and substantial existence the volumes to which he had at best but a shadowy and worthless legal claim, when at last he comes forward to claim in a court of equity the possession of that which the enterprise and capital of appellants have produced. Courts of equity are not accustomed to give to mere cunning the reward which it seeks, and upon this ground alone, if for no other reason, the decree should be reversed.

V.

Appellants' Volumes not an Infringement of the Original Edition.

The ninth assignment of error questions the finding of the court that the volumes, as published by appellants, were an infringement and piracy of the original edition, each of such volumes being a new and independent work, not copied from the Freeman edition, but prepared by the original and independent labor of appellants' editors. And in discussing this branch of the case, it will be necessary to consider separately the testimony relating to volumes 32 to 38, and that bearing upon 39 and 41 to 46, since the former volumes were, with the exception of the foot notes, prepared entirely from the Freeman volumes, while 39 and 41 to 46, as published by appellants, were, with the exception of the opinions of the judges, prepared from the records and files of the Supreme court of Illinois.

The editorial work upon appellants' volumes 32 to 38, inclusive, was performed by Marshall D. Ewell and Van Buren Denslow, Mr. Ewell preparing volumes 32 to 36, inclusive, and Mr. Denslow preparing 37 and 38. It is conceded that resort was not had to the original records in the preparation of either of the volumes from 32 to 38, and that, with the exception of the foot notes, the entire information contained in appellants' volumes 32 to 38 was derived from the Freeman volumes, with the exception of some instances in which the facts were obtained from reports of the same cases in volumes preceding 32.

Mr. Ewell testifies, with reference to his method of preparing volumes 32 to 36 (page 206), that in preparing

his syllabi he first read the opinions, generally reading them twice, in order to get the point decided by the court. He then made up his mind as to what the case decided, and invariably wrote the head-notes in his own language, except where the court had formulated the point decided, in which case, if he thought it stated in suitable form, he adopted the language of the court. He did not, in any instance, copy Freeman's head-notes, but arrived at his conclusions from reading the cases, without using Freeman's head-notes in any manner whatever. In preparing the statements of fact (page 207) he used his own language, and did not copy the language used by the reporter, unless the latter had copied from documents in the record, in which cases he used such documents, or copies, and in some cases he obtained his information entirely from prior reports of the same case, reported in volumes prior to the 31st. In making his statements of fact, he derived some information from the opinions of the court, which he always read and compared with the statement of the reporter, to see if they harmonized, and in a number of instances found a disagreement. In those instances he took the statement of the court in preference. Whenever the statement of the court was sufficient, in his judgment, to give a clear understanding of the case, without any preliminary statement, he made none, but let the court state the facts in the opinion. The opinions of the court are the same in the two editions, except that in many instances he discovered errors of citation, which he corrected, and also some verbal inaccuracies. He prepared his index by taking proofs of the syllabi, as prepared by him, cutting them up and classifying them, without even looking at the original edition. He found some cases where Freeman had failed to state all the case decided,

and his (Ewell's) head-notes contain much more matter, in many instances, than Freeman's. In nearly every case he prepared a note to prior adjudications in the Supreme court, with some references to reports of other states. This matter was obtained from digests and reports, by his own independent investigation (page 208). He also prepared abbreviated or condensed statements of the head-notes, preceding the head-notes themselves. These were prepared by reading his head-notes, and consist of one or more words in "small caps.," and a line in italics, stating briefly the point ruled in the syllabus. These differ materially from Freeman's, although, from the nature of the case, they bear a resemblance to his.

He instituted a careful comparison of the different volumes of the two series, with reference to the syllabi referred to in the affidavits used on the motion for the preliminary injunction, and found that where the head-notes, as prepared by him and by the official reporter, bear an apparent resemblance, in every instance, without an exception, they are cases where he has taken the language of the court, or modified such language in preparing his head-notes.

The only material furnished him for the work was the Myers edition (page 212), and his copy to the printer was furnished either in manuscript or print, all the printed material being taken from the Myers books. The object in changing his syllabi was to avoid infringing the copyright. He obtained his information as to the instructions given in the court below, the name of the judge below who tried the case and the names of counsel from the Myers books (page 213.) The rules of court as printed in the Myers books were cut out and sent to the printer in that way, but he is not certain whether the names of

counsel were, but thinks they were cut out, changing the second names; that is, in case of a firm, he only gave the first one of the firm (page 215). These alterations were made on the printed page, which was then sent to the printer. In preparing his head-notes he first read the opinion through with a pencil, and when he came to what seemed to be a statement of the principle decided, he drew a straight line opposite that portion of the opinion, and so on to the end; and then copied these out of the opinion, with such verbal changes as seemed to be proper to adapt them to the syllabus. In a table prepared by the witness, marked "Defendants' Schedule B," (page 220) he gives a comparison of the two editions, showing the number of pages in each, and the number of cases in each containing statements of fact, with the differences in the two editions.

Volumes 37 and 38 were prepared by Mr. Denslow in substantially the same manner as the volumes prepared by Mr. Ewell. (See testimony of Van Buren Denslow, pages 220 to 270.)

It is thus shown, by the testimony of the editors of volumes 32 to 38, that the only use made by them of the original volumes, was as to the title of the case in the court below, the names of counsel, the rules of court and tables of cases reported, abridging the statements of fact in some instances, entirely rejecting them in others, and copying the published opinions of the judges. The arguments of counsel are omitted in the Callaghan edition, and the head-notes, foot-notes and indexes are wholly the result of the independent editorial labor of Mr. Ewell and Mr. Denslow. It can hardly be pretended that Myers had any literary property in the titles of the cases, or in the names of the court below and of counsel, or in the rules of court.

The tables of cases reported comprise but two or three pages of each volume, and are merely an arrangement in alphabetical order of the titles of the cases. No more literary labor is involved in their production than in the alphabetical arrangement of words in a dictionary, or in the ascending figures in a column, and it is admitted that such an arrangement can in no sense be the subject of literary property, or of exclusive ownership. Frequent resemblances will be found in the head-notes of the two editions, but, upon comparison, it will be found in every instance that there is no greater identity in this respect, than must always result from the independent labor of two persons, seeking at different times each to state, in different language, the substance of the principle of law affirmed by the court. All the volumes of the two editions are before the court, and a comparison by the court is earnestly invited, as to any such resemblances in the head-notes. It is confidently believed that such an examination will demonstrate the absolute correctness of the statements of Mr. Ewell and Mr. Denslow, that in all such cases the apparent identity or resemblance between the two series of head-notes is due to the fact that each reporter has copied more or less closely the exact language of the court. If, therefore, the members of the court shall, as the result of any such comparison, find an apparent identity or similarity between the head-notes of the respective editions, it is earnestly asked that in every such case a careful examination should be made of the opinion of the court from which each of the reporters or editors drew his inspiration.

As regards the statements of fact preceding the opinions of the court, in the Callaghan edition, it is to be observed, first, that in very many cases they are wholly omitted, for

the reason stated by Mr. Ewell, that the opinions of the court frequently state the facts with sufficient clearness. In other cases, where any use has been made of Freeman's statements of fact by appellants' editors, they have simply abridged them, presenting the result in a clearer and more condensed form. And the doctrine is well established that an abridgment is not a piracy.

Hawkesworth v. *Newberry*, Lofft's Rep., 775.
Gyles v. *Wilcox*, 2 Atk., 141.
Spiers v. *Brown*, 6 W. R., 352.
Wilkins v. *Aikin*, 17 Ves., 422.
Folsom v. *Marsh*, 2 Story, 107.
Story's Ex'rs v. *Holcombe*, 4 McLean, 306.
Stowe v. *Thomas*, 2 Wall. Jr., 547.

Mr. Justice Story in *Folsom* v. *Marsh*, 2 Story, 107, defines an abridgment thus:

"There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely a facile use of the scissors; or extracts of the essential parts constituting the chief value of the work."

So Mr. Justice Grier in *Stowe* v. *Thomas*, 2 Wall. Jr., 547, observes (page 566):

"Hence in questions of infringement of copyright, the inquiry is not whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a new work, requiring invention, learning and judgment, or only a mere transcript of the whole or parts of the original with merely colorable variations."

And the distinction between a compilation and an abridgment is clearly drawn by Mr. Justice McLean in *Story's Ex'rs* v. *Holcombe*, 4 McLean, 306, as follows (page 314):

"A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of the author. The former can not be extended so as to convey the same knowledge as the original work; the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former can not adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed when published shall impair the value of the original book; a fair abridgment, though it may injure the original, is lawful."

So in *Wilkins* v. *Aikin*, 17 Ves., 422, Lord Eldon says:

"Upon inspection of the different works, I observe a considerable portion taken from the plaintiffs that is acknowledged; but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstances. The question upon the whole is, whether this is a legitimate use of the plaintiffs' publication in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial; it does not follow that therefore there is a breach of the legal right."

Hawkesworth v. *Newberry*, Lofft's Rep., 775, is an instructive case in point. This was a bill to enjoin the publication of an infringement of a book of voyages. Lord Chancellor Apsley held, that to constitute an abridgment proper the whole of the original must be preserved in its sense; the act of abridging being an act of understanding employed in carrying a large work into a smaller composition, making it a new and meritorious work; that that had been done in the case at bar, the defendant's edition being read in one-fourth the time of plaintiff's, and all the substance being preserved and conveyed in language as good as or better than the original, and in a more useful and agreeable manner. "That he had consulted Mr

"Justice Blackstone, who as an author himself had done "honor to the country; that they had spent some hours to- "gether, and were agreed that an abridgment where the "understanding is employed in retrenching unnecessary and "uninteresting circumstances, which rather deaden the nar- "ration, is not an act of plagiarism, but an original and "meritorious work." Accordingly the injunction was refused and the bill dismissed.

Spiers v. *Brown*, 6 W. R. 352, was a bill to enjoin defendant from publishing a dictionary which was alleged to be an infringement of plaintiff's. It was apparent that defendant had made a large use of plaintiff's work, and without any acknowledgment whatever, it being used without alteration or addition. Yet defendant had bestowed much original labor upon his work in addition to that taken from plaintiff's, and the court held that defendant's work was not a piracy, and dismissed the bill.

Gyles v. *Wilcox*, 2 Atk., 141, was a bill to restrain defendant from publishing a book entitled "Modern Crown "Law," as being a piracy upon Sir Mathew Hale's "Pleas of the Crown." The bill alleged that defendant's work was borrowed verbatim from plaintiff's, omitting only some old statutes which had been repealed, and translating all the Latin and French quotations into English.

"The question is," says Lord Chancellor Hardwicke, page 143, "whether this book of the new Crown Law, which the defendant has published, is the same with Sir M. Hale's *Histor. Placit. Coronæ*, the copy of which is now the property of the plaintiff. Where books are colorably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may,

with great propriety, be called a new book, because not only the paper and print, but the invention, learning and judgment of the author are shown in them, and, in many cases, are extremely useful, though in some instances prejudicial by misstating and curtailing the sense of the author. If I should extend the rule so far as to restrain all abridgments, it would be of mischievous consequence, for the books of the learned, *les Journals des Scavans*, and several others that might be mentioned, would be brought within the meaning of this act of Parliament."

Volume 40 was printed by Callaghan & Company, but never published. Volumes 39 and 41 to 46, inclusive, as published by Callaghan & Company, with the exception of the opinions of the court, which were taken from the Freeman edition, and compared directly with the original, are in all respects a new and original work, being compiled from original sources, viz., the opinions and the records of the Supreme court of Illinois, on file at Ottawa, Springfield and Mt. Vernon. It is true that parts of volumes 39, 43, 44 and 45 had been prepared by other editors, but all of their work, with the exception of their head-notes and foot-notes, was rejected by Mr. Denslow, who did the remaining work upon these volumes, and all of the editorial work upon volumes 41, 42 and 46.

Joseph M. Bailey originally prepared volume 39 of the Callaghan edition, his head-notes being prepared by reading the opinions of the court carefully in all cases as published by Mr. Freeman, without assistance from the latter's head-notes (page 395.) Wherever he found the principle tersely stated in the opinion, he copied the exact language, but where it was impracticable to state the principle in the language of the court, he used his own language, without adopting or using that of Freeman. His foot-notes were prepared wholly without regard to

Freeman's volume, which contained no foot-notes, and were entirely from an independent investigation of other adjudicated cases (page 396). Mr. Ewell's work upon volumes 44 and 45 was done in the same manner (page 400). Mr. Denslow retained only Bailey's head-notes and foot-notes for volume 39 (page 404), omitting the statement of the court from which the case came up, the name of the judge of the court below, the statement of facts, if any, the names of counsel and their briefs. For all this matter, as well as for the title of the cases themselves preceding the syllabi, he went to the records and files of the Supreme court in the different divisions, and supplied that portion of the matter from that source. He also compared the opinions of the Supreme court, as published by Freeman, with the original opinions as filed or recorded, correcting them in all cases in volumes 39 and 41 to 46. He made new statements of fact, beginning with the statements of the court from which the case came up, and he made his index by taking the syllabi of the book and arranging the different points in proper order. He pursued the same course as to volume 43, which had been partly prepared by Levi J. North (page 406). He retained but few of Mr. North's syllabi, and rewrote the syllabi almost entirely for the first fifty pages of the book, and entirely for the balance. He preserved Mr. North's foot-notes, but the other matter prepared by him between the syllabus and the opinion, he rejected, and took this matter, including the title of the case, and all the matter between the syllabus and the opinion from the files and records of the Supreme court. Mr. Ewell's head-notes to volumes 44 and 45 he retained, with few changes. All the other matter prepared by Mr. Ewell was omitted and obtained from the

record. He retained none of the briefs of counsel or statements of fact, as prepared by Bailey or Ewell, but prepared these entirely from the records of the cases in the Supreme court. These he rewrote (page 408), entirely from the original records on file in the Supreme court, except in some cases where Freeman had introduced, in his statement, long copies of documents, such as a pleading or an agreement, which, on examining the files, he found had been cut out of the abstract of the record with the scissors, in whlch cases he made use of such copies from Freeman's edition. This occurred in but few instances, the witness thinks not more than seventeen cases in the entire seven volumes (page 440). In preparing the briefs of counsel he was furnished by the clerk of the court with a copy, where there were more than two or three on file, with the privilege of cutting it, and did so in some cases (page 408). In other cases where not furnished a brief for cutting, he condensed the brief from the written or printed brief on file, writing out the condensed brief in manuscript and furnishing the manuscript to the printer. These were the written or printed briefs filed at Springfield, Mt. Vernon or Ottawa. He used no portion of Mr. Freeman's printed matter in preparing the briefs of counsel. Volumes 41, 42 and 46 of the Callaghan edition, were prepared entirely by Mr. Denslow, the method of preparation being the same as above narrated; that is, he obtained the title of the case, and the matter between the syllabus and the opinion from the record, and revised the opinion from the record and wrote out the syllabus from the examination of the printed opinion and the record on file (page 409). In preparing his statements of the cases, he made no use of Mr. Freeman's, but procured the name of the court below, the names of counsel, the statement

of facts and briefs of counsel entirely from the record. In preparing his head-notes (page 410), Mr. Denslow neither copied nor followed Freeman's in any manner whatever. All his indexes were prepared by cutting out the syllabi from the Callaghan edition and rearranging them under appropriate heads, neither copying, using nor following Freeman's indexes in any manner (page 411). His foot-notes (page 412), consist of citations of analogous cases, prepared by himself. Mr. Denslow spent about sixteen months time, exclusively, upon the volumes 39 and 41 to 46, inclusive, in addition to considerable time which he had previously spent upon the head-notes and foot-notes of volumes 41 and 42 (page 418.)

It is thus shown that the Callaghan edition of volumes 39 and 41 to 46 is an entirely new and independent work, all of the matter which it contains being taken from the original records and files of the Supreme court of Illinois, with the exception of the opinions of the court, which were first taken from the Freeman volumes, and then carefully compared with the manuscript opinions of the judges on file, and corrected by such comparison before publication. Indeed, the most casual inspection and comparison of the volumes of the Callaghan edition with the Freeman volumes, will satisfy the court that our books are a wholly new and original production. It is true that, as in the case of volumes 32 to 38, some apparent resemblances will be found in the head-notes of the respective editions of volumes 39 and 41 to 46; but in all such cases, it will be found upon comparison, that the resemblance is due to the fact that each reporter has closely followed, or literally copied from the language of the court. There is no other or greater identity in the head-notes, than would necessarily result from the independent labor of two minds

addressed to one and the same problem, viz: that of formulating the language of the court, in the shape of a syllabus. On almost every page of appellants' volumes 39 and 41 to 46 will be found intrinsic and conclusive evidence of the original labor put upon the work by Mr. Denslow. In a large number of cases in the Freeman volumes no statements of fact whatever are given, and no briefs of counsel. In many of these cases, in the Callaghan edition, full statements of fact are given, together with copious extracts or compilations from the arguments of counsel, none of this matter, in such cases, appearing in the Freeman edition. And in those cases where Freeman gives statements of fact and briefs of counsel, the corresponding matter in the Callaghan edition is so wholly different as to afford, on every page, intrinsic evidence that it was taken from other and independent sources. In such cases many facts appear in the statements of fact, in the Callaghan edition, which do not appear in Mr. Freeman's statements. Also in the briefs of counsel, as compiled by Mr. Denslow, in cases where Freeman has given the points of counsel, it will be found that Mr. Denslow has given many points and authorities which are wholly omitted by Freeman. In short we solicit, at the hands of this court, the most careful comparison and contrast between the two editions, and are confident that such examination will demonstrate the fact that the Callaghan volumes are an absolutely new and original production.

The extent of the new and original matter appearing in the Callaghan edition, in excess of that contained in the Freeman edition, is clearly shown in "Exhibit A" to the deposition of John L. Pearson (page 489). This table contains a comparative statement of the two editions as to the number of head-notes, the pages of head-notes

and foot-notes, the number of cases with statements of fact, the pages of statements of fact, the number of cases with arguments of counsel, the pages of arguments of counsel, the pages of indexes and the total original pages in the two editions. It shows a large excess in all these respects in the Callaghan edition, with the exception of a few cases where the excess is in favor of the Freeman edition, and these cases are indicated in Mr. Pearson's "Exhibit A" by the minus sign. With these few exceptions, the Callaghan volumes far exceed the Freeman volumes as to the number of pages of original matter upon each of the points above enumerated. For the convenience of the court, that exhibit (page 489), is here inserted, as follows:

Exhibit A to Deposition of J. L. Pearson.

Volume.	Number of head-notes.	Pages of head-notes and foot-notes.	Number of cases with statements of fact.	Pages of statements of fact.	No. of cases with arguments of counsel.	Pages of arguments of counsel.	Pages of index.	Total original pages.
Myers' Edition.								
XXXIX	554	64	45	88	25	57	94	303
XLI	431	52	73	64	13	22	95	233
XLII	414	63	52	65	17	31	80	239
XLIII	489	58	68	50	9	13	91	212
XLIV	436	53	50	49	8	15	83	200
XLV	444	47	63	37	2	3	74	161
XLVI	415	43	39	26	0	0	73	142
Callaghan Edition.								
XXXIX	575	91	50	88	45	54	93	326
XLI	453	130	70	53	37	20	110	313
XLII	406	92	62	77	57	78	89	336
XLIII	479	97	77	81	53	42	100	320
XLIV	457	190	47	61	56	35	80	366
XLV	457	113	51	45	24	18	98	274
XLVI	417	134	55	60	48	42	85	321
Excess in Callaghan Edition.								
XXXIX	21	27	5	0	20	–3	–1	23
XLI	22	78	–3	–11	24	–2	15	80
XLII	–8	29	10	12	40	47	9	97
XLIII	–10	39	9	31	44	29	9	108
XLIV	21	137	–3	12	48	20	–3	166
XLV	13	66	–12	8	22	15	24	113
XLVI	2	91	16	34	48	42	12	179

It is thus shown by the intrinsic testimony of the volumes themselves that the Callaghan edition far exceeds the Freeman edition as to the quantity of original matter compiled from the records of the court, wholly irrespective of the testimony of Mr. Denslow to the fact that such matter was taken by him from the official records. Indeed, the learned judge of the Circuit court, in his opinion upon the final hearing of the supplemental bill as to vol-

umes 39 to 46, while finding that the Callaghan volumes technically infringed the Freeman volumes, conceded that the infringement was very slight, and that the points of similiarity were trivial and unimportant. Upon this point Judge Drummond says (page 63):

"The great bulk of what may be termed copyright matter in each volume of the defendants, seems to be made up independent of the corresponding volume of the plaintiff, and in very many instances, where a similarity can clearly be traced, and the use of the materials of the plaintiff's volumes distinctly made out, the similarity is trivial and unimportant, and I should feel extremely reluctant to hold worked a forfeiture of the whole edition. It would seem to me, while holding there is technically an infringement of the copyright of the plaintiff, the fairest view to take of the whole subject would be to require what might be termed a small royalty, such as the defendants could afford, to be paid to the plaintiff for the sale of the volumes named."

But it will be insisted by appellee that we have infringed his pretended copyrights by taking the opinions of the judges from his volumes, instead of from the records of the court. It is sufficient to say that there can be no copyright in the labors of the judges.

Wheaton v. *Peters*. 8 Pet., 591.
Gray v. *Russell*, 1 Story, 11.
Chase, *Assignee*, v. *Sanborn*, 6 Pat. Off. Gazette, 932.

"It may be proper to remark," say the court in *Wheaton* v. *Peters*, 8 Pet., 591 (page 668), "that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right."

Indeed, this proposition is conceded by appellee's bill, but it is contended that we still had no right to print the

opinions from his books. But, if the opinions of the judges are not susceptible of private ownership, or the subject of copyright, no publication or arrangement of those opinions can abridge or impair their character as public property. The element of publicity having once attached to them by virtue of the public functions and duties of the judges in their preparation, they remain public for all purposes and for all time. Whatever their arrangement, their embellishments, or their surroundings, they continue free to all—as free and as public as the Decalogue, the four Gospels, or the Sermon on the Mount. They are public property from the moment of their enunciation by the judges; they are public property when they come into the reporter's hands, and while they remain in his possession; and no action of reporter or publisher can change their character or essence, and reduce to the level of private ownership that which the law has made free for all purposes and for all time.

It will also be contended that appellee is entitled to the exclusive right to the arrangement of each of his volumes, the division of opinions into separate volumes, the arrangement of the decisions as accompanied with the head-notes, stipulations, errors assigned, etc., and the arrangement of the pages of his volumes. The claim for arrangement, as thus broadly presented, may be dismissed with the remark that such arrangement is as old as the system of law reporting. From a period whereof the memory of man runneth not to the contrary, law reporters have uniformly pursued the arrangement adopted in these books, the table of cases reported, the head-notes, statements of fact, opinions of the court, and indexes being always arranged in the order named, and in the order followed in these volumes. The claim of literary property in such arrange-

ment is as idle as would be the claim of literary ownership in the arrangement of addition before subtraction in an arithmetical work.

As regards the division of the cases into volumes, and the order in which the cases follow each other in the several volumes, the most casual inspection of the Freeman edition discloses an entire absence of method in such division and arrangement, plainly demonstrating that chance, and chance only, governed in selecting the cases for the different volumes, as well as in determining their relative position in the several volumes. The arrangement is neither topical nor chronological, and is governed by no known laws of selection, disposition, or fitness. It is not pretended that this arrangement was the work of Mr. Freeman, the original reporter, and it was probably the result of the caprice or convenience of the publisher or printer in first printing the decisions which were first prepared by the reporter, without any element of selection, fitness, or literary labor in assigning their relative positions in the volumes.

The paging of the Freeman edition is equally wanting in any element of literary property, originality or exclusive ownership. Ever since the invention of printing, books have been paged in numerical order, and appellee might with equal propriety claim an exclusive property in the system of Arabic numerals as in the paging of his books. Moreover, the printed paging is merely the mechanical labor of the printer, and is never performed by the author or publisher.

These positions are substantially conceeded by the opinion of Judge Drummond, and that opinion itself affords an unanswerable argument against the claim of copyright, asserted by the bill, in the arrangement of the cases, and

in the paging of the Freeman edition. Upon these points, Judge Drummond says (page 63):

"The fact appears to be, and indeed it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, the Freeman edition has been followed by the defendants; but while this is so, I should not feel inclined, merely on that account and independent of other matters, to give a decree for the plaintiff, although it is claimed that the arrangement of the cases, and the paging of the volumes, are protected by a copyright. Undoubtedly in some cases, where are involved labor, talent, judgment, the classification and disposition of subjects in a book entitle it to a copyright; but the arrangement of law cases, and the paging of the book may depend simply on the will of the printer, of the reporter or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. Here the object, on the part of the defendants, seems to have been that there should not be confusion in the references and examination of cases; but the arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I regard it not as an independent matter, but in connection with other similarities existing between the two editions, when I say, taking the whole together, the Freeman volumes have been used in editing and publishing the defendants' volumes."

We are quite content upon this branch of the case to accept the test thus established by Judge Drummond himself, as to the right of literary property in the arrangement of a work, viz.: that it shall be an arrangement "where "are involved labor, talent and judgment," and not a case where, in the language of Judge Drummond, "the ar- "rangement of law cases and the paging of the book may "depend simply upon the will of the printer, of the re- "porter or publisher, or the order in which the cases had "been decided, or upon other accidental circumstances." The act of Congress extending protection to authors in their literary property, was never intended to cover the

mere chance arrangement by a printer of the work committed to him for printing. Protection to literary labor, in the creation of a new and original literary product, is the object had in view by the legislation of Congress upon the subject of copyrights, under the constitutional authority to legislate for the protection of authors. It was never intended that such protection should be extended to the mere capricious arrangement of law reports by a printer, or the mechanical paging of the volumes, which is solely the printer's work. It is true that the courts have, in some cases, held that the arrangement of a published work was protected by the act of Congress. But, without exception, these are cases where the arrangement is itself an appreciable element of literary property, and the result of independent literary labor, or of a new and original combination of materials, or a logical, methodical and scientific arrangement of the matter used. To entitle an author, therefore, to protection in the arrangement of his work, it must be the result of independent literary labor and of method, not the product of mere accident or caprice. The arrangement must present the various subjects of which the author treats in a logical and connected series, cause preceding effect, and effect following cause. There must be a connected sequence and consequence, both in the matter treated and in the method of treatment, and not, as in the case at bar, an indefinite, incoherent blending of cases in a juxtaposition which is wholly the result of accident or the caprice of the printer. And no authority can be found holding that the mere arrangement of cases in a volume of law reports, or the paging of such volume, constitutes in itself a literary product which is the subject of copyright under the act of Congress.

As regards the question of the arrangement and sequence of the cases and the paging in the Callaghan volumes, the method adopted is precisely that which was pursued by the late Mr. Justice Curtis, in his edition of the decisions of this court, in which he condensed, into twenty-one volumes, fifty-seven volumes of the original series of reports. And the same method seems to have been pursued by Mr. Justice Miller in his continuation of the condensed series of the reports of this court, beginning with the 18th Howard. In both cases the reported cases are arranged in precisely the same order in the new edition as in the old, and the paging of the original edition is preserved by star paging, both in the edition of Mr. Justice Curtis and in that of Mr. Justice Miller. The same analogy seems to exist between the Callaghan edition of volumes 32 to 38 and Curtis' Decisions and Miller's Decisions, as to the source from which they derived the titles of the cases reported, the name of the court below in which the cases originated and the names of counsel. Both Mr. Justice Curtis and Mr. Justice Miller seem to have taken these features directly from the original series of reports, just as Mr. Ewell and Mr. Denslow did in the preparation of volumes 32 to 38 of the Callaghan edition. (As to volumes 39 and 41 to 46 it will be remembered that Mr. Denslow testifies that he obtained the titles of the cases, the name of the court in which the case originated, and the names of counsel, as well as the statements of fact, wholly from the original records). But it has never been pretended that in thus editing and re-reporting the decisions of this court, from the original series of reports, either of the learned editors named infringed the copyright in the original volumes because of adopting the same arrangement and sequence of cases, or because

of the star paging, or because they appear to have taken the titles of the cases, the names of the court and the names of counsel from the original edition.

The claim of copyright in the title to the Freeman volumes may be dismissed with two suggestions:

First. We have not copied the title of the Freeman edition. An examination of the title pages of each of appellants' volumes will show that they are totally different from those of the corresponding Freeman volumes.

Second. The title of a published work is not the subject of copyright, being a mere appendage or description which is not within the meaning of the act of Congress.

Jollie v. *Jaques*, 1 Blatchf., 618.
Osgood v. *Allen*, 1 Holmes, 185.
Drone on Copyright, 145.

"The right secured by the act, however," says Mr. Justice Shepley, in *Osgood* v. *Allen*, "is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require, that it should be the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies and frequently does not in any way describe the literary composition itself, or represent its character."

VI.

Appellants were compelled to make Discovery in aid of the Forfeiture sought by Appellee.

By the interlocutory decrees, both upon the original bill as to volumes 32 to 38, and upon the supplemental bill as to volumes 39 to 46, appellants were compelled to produce

before the master their books and accounts, showing the extent of their publication and sale of the volumes in controversy. The original bill itself prayed a forfeiture of all of the volumes published by appellants (page 10). This forfeiture has never been waived by appellee. It is true that the final decree awarding damages did not grant the forfeiture prayed by the original bill, because such a procedure would be wholly foreign to the jurisdiction of a court of equity. Nevertheless the forfeiture sought by appellee, and expressly asserted by his bill, has never been waived by him, and the record discloses that he has brought an action of replevin to enforce the forfeiture. The act of Congress of 1831 provided that the infringing volumes should be forfeited to the complainant. The provision is found in section 6 of the act entitled, "An act to "amend the several acts respecting copyrights," approved February 3, 1831, 4 U. S. Statutes at Large, 436. Section 6 provides that any person who shall print or publish a copyrighted book, without the consent of the owner, "shall forfeit every copy of such book to the person le- "gally, at the time, entitled to the copyright thereof; and "shall also forfeit and pay fifty cents for every such sheet "which may be found in his possession," etc.

The action of the Circuit court in thus compelling us to make discovery in aid of the forfeiture, is the more astounding when it is remembered that our demurrer upon this branch of the case had already been sustained. That demurrer (page 15) was directed to so much of appellee's original bill as sought a discovery and an accounting, for the reason stated in the demurrer, "That by such "discovery and accounting complainant seeks to subject "these defendants to the penalties and forfeitures pre- "scribed in the act of Congress concerning copyright,

"and these defendants are advised by the rules of "practice governing courts of equity, that they can not be "required to make discovery of or concerning any mat- "ter or thing which might subject them to penalties or "forfeitures." This demurrer was argued before Mr. Justice Harlan, was taken under advisement and was finally sustained (page 28). By the solemn judgment, therefore, of the Circuit court, it had already been determined that appellants could not be compelled to make discovery, so long as appellee still asserted his right to a forfeiture of the alleged infringing volumes. With this judgment upon the demurrer still in force and unreversed, the Circuit court proceeded, in direct disregard of its own judgment, to award a discovery, to which it had already decided that appellee was not entitled. Not only was the discovery decreed by the court, but it was actually enforced. We were compelled to produce before the masters our books and papers, showing the number of volumes printed and sold, and all our books of account relating to the current business of the period in question. Not only this, but experts selected by appellee were sent to examine our books and accounts, appellee still asserting, as he has always asserted, his right to a forfeiture of our property.

By a uniform current of authority, English and American, the doctrine is too firmly established to be longer challenged, that equity will never compel a discovery in aid of penalties or forfeitures, unless the right to such penalties or forfeitures is waived by the person seeking the discovery.

Story's Equity Pleadings, Secs. 521, 575 and 576.

Story's Equity Jurisprudence, Sec. 1494.

Mitford's Equity Pleadings, pages 186, 193 to 198.
Wigram on Discovery, pages 62, 150 and 195.
1 Daniell's Chancery Practice, 563.
Drone on Copyright, 534.
United States v. *Saline Bank of Virginia*, 1 Pet., 100.
Atwill v. *Ferrett*, 2 Blatchf., 39.
Johnson v. *Donaldson*, 18 Blatchf., 287; 3 Fed. Rep., 22.
Chapman v. *Ferry*, 12 Fed. Rep., 693.
Bird v. *Hardwick*, 1 Vernon, 109, note.
Colburn v. *Simms*, 2 Hare, 543.
Attorney General v. *Lucas*, 2 Hare, 566.
Chauncey v. *Tohowden*, 2 Atk., 392.

Story's Equity Pleadings, section 575, states the rule as follows:

"The rule is that the defendant shall not be obliged to discover what may subject him to a penalty or forfeiture, or to a criminal accusation, and not what must only."

And the same author, section 576, says:

"The maxim of the common law is, *nemo tenetur seipsum prodere*. It constituted one of the just objections to the court of Star Chamber, that, in criminal informations, it compelled the party accused to answer upon oath to the accusation; and thus, in arbitrary times, became an instrument of gross oppression and injustice. But the court of Chancery has always steadily refused to compel any man to criminate himself, and, by analogy, to disclose any fact which will subject him to a penalty or forfeiture; and it has thus assisted in carrying into complete effect the benign maxim of the common law above alluded to. So that it is the just boast of Lord Hardwicke, that

the general rule, established with great justice and tenderness in the law of England, is fully recognized and acted on in courts of equity, that no person is obliged to discover what may tend to subject him to a penalty or punishment, or to that which is in the nature of a penalty or punishment."

Mr. Drone in his valuable treatise upon the law of copyright, states the doctrine as follows, page 534:

"The court may require the defendant to disclose the number of piratical copies which he has printed, imported or sold, the number on hand, the proceeds of sales, etc., but the defendant can not be compelled to make such discovery when it will subject him to forfeitures and penalties, unless these are waived by the complainant."

United States v. *Saline Bank of Virginia*, 1 Pet., 100, was a bill filed by the United States against members of an unincorporated banking association of the State of Virginia, charging that the association issued bank bills as currency, which had come into the Treasury of the United States in payment of public duties; that payment had been refused, and an account was prayed of the funds of the company, and also that the property of its members might be decreed to be liable for the deficiency. Defendants pleaded that the emission of the bills took place within the State of Virginia, by the laws of which state penalties were inflicted for such emission, and they prayed judgment whether they should be held to answer. The bill was dismissed in the court below, and the judgment of that court was affirmed upon appeal. Chief Justice Marshall, delivering the opinion of this court, says, page 104:

"This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia. The court below decided in favor of the validity of the plea and dismissed the bill.

"It is apparent that in every step of the suit the facts required to be discovered, in support of this suit, would expose the parties to danger. The rule clearly is that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it. The decree of the court below is, therefore, affirmed."

It follows, therefore, that until appellee should expressly waive his right to the forfeiture asserted by the bill of complaint, and by his action of replevin, he was not entitled to any discovery on the part of appellants. The waiver of the penalty or forfeiture is an indispensible condition to the right of appellee to the discovery sought.

Story's Equity Jurisprudence, Section 1509, states the rule upon this point as follows:

"Thus in cases which involve a penalty or forfeiture of a public nature, a bill of discovery will not lie at all. And in cases which involve only a penalty or forfeiture of a private nature, it will not lie unless the party entitled to the penalty or forfeiture waives it."

Atwill v. *Ferrett*, 2 Blatchf., 39, is an instructive case in point. The bill sought a discovery by the defendant as to the number of plates and pieces of music on hand, in aid of a forfeiture sought by complainant under the act of Congress of 1831, concerning copyrights. The right to such discovery was denied, BETTS J. saying (page 45):

"It is an incontrovertible principle of equity law that a defendant can not be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. (Story's Eq. Pl., § 521, note 3 and §§522, 575, 598; Mitford's Pl. 194, 197.) In this case, the bill claims a forfeiture under section 7 of the act of February 3, 1831, (4 U. S. Stat. at Large 438) of the plates and pieces of music on hand. Had the forfeiture been waived by the plaintiff, the defendants might be compelled to

disclose the number of their publications, the quantity on hand and the amount realized from sales, in aid of the recovery of damages in a suit at law. So, probably, on such discovery, equity might compel the defendants to deliver up to the plaintiffs the forfeited copies. But the bill is clearly faulty, in directly requiring the defendants to convict themselves of the act which carries with it the forfeiture sued for."

VII.

The Damages Excessive.

The argument thus far has been addressed to the merits of the case, as distinguished from the question of damages. It remains to consider the errors assigned as to the amount of damages awarded by the final decree.

By the interlocutory decree, upon the original bill, finding appellants guilty of infringement as to volumes 32 to 38, a reference was ordered to Henry W. Bishop, master, to take an account as to the damages. The interlocutory decree upon the supplemental bill, contained a similar reference to John I. Bennett, master, to compute the damages as to the sales of volumes 39 and 41 to 46. The final report of Mr. Bishop (page 64), found that appellants had printed 4,313 copies of volumes 32 to 38, and sold 2,909 copies at an aggregate price of $13,451.19, being an average of $4.62½ per volume. He refused to allow credit for stereotyping, editorial work, proof reading, and salaries to members of the firm, and found the total cost to appellants, in the production of these volumes, including twelve and seven-eighths per cent. as legitimate expenses for conducting their business, to be $6,465.14. He allowed credit for this amount, as the entire cost of producing the volumes, and deducting this sum

from the gross receipts, $13,451.19, he found a balance of $6,986.05 as the damages sustained by appellee, for which amount he recommended a decree.

The report of Mr. Bennett (page 70), found the total number of volumes 39 to 46 inclusive, on hand and sold, including four copies of volume 40, to be 3,854. He found the total number sold to be 2,292, and the gross receipts from such sales, $10,231.48, and the average selling price per volume, $4.46. He refused to allow appellants credit for stereotyping, editorial work, and salaries paid to members of the firm, but allowed them a credit of twelve per cent. as the expenses of conducting their business. He refused to allow credit for the cost of the volumes on hand and unsold, and distributed the expenses of production over all the volumes, both sold and unsold. Upon this basis of computation, he found the total cost of producing the volumes sold, including twelve per cent. as general expenses, to be $5,798.04. He found the total receipts from sales to be $10,231.48, at an average selling price of $4.46. Deducting the cost of production from the gross receipts, he found a net balance of $4,433.44, for which amount he recommended a decree in favor of appellee. He refused to allow appellee damages upon 156 copies of the infringing volumes which he found to be resales by appellants at second-hand, and for which he had already charged them in the accounting as to their original sales.

Exceptions were taken by both parties to both reports. Appellee's first and second exceptions to the report of Mr. Bennett, relating to the number of volumes sold, were sustained, the court finding that appellee was entitled to damages on the one hundred and fifty-six second-hand volumes or re-sales, which had been disallowed by

the master, thus increasing the number sold from 2,292 to 2,448, and increasing the damages by the profits on such re-sales, amounting to $340.70. All other exceptions to both reports were overruled and a decree awarded for $11,760.19 (page 88.) The eleventh, twelfth and thirteenth errors assigned, all relate to the question of damages and the ruling of the court upon the various exceptions to the masters' reports, and they will therefore be discussed together.

Volume 40 was printed by appellants, but was never published, the entire edition still remaining in their hands, with the exception of four copies. The unsold copies of volumes 39 to 46 remained in the possession of appellants. Upon the entry of the decree by Judge Drummond, upon the hearing of the original bill, finding appellants guilty of infringing the copyright in volumes 32 to 38, inclusive, appellee began an action of replevin to enforce the forfeiture of these volumes and to recover their possession. Appellants thereupon filed a cross-bill to enjoin the prosecution of this action, upon the ground that Myers having, by his bill in equity, sought a discovery and an accounting, which had been decreed by the court, he thereby waived his right to enforce a forfeiture. The motion for this injunction coming on for hearing, at the suggestion of Judge Drummond a stipulation was entered into, whereby appellants deposited the unsold copies of volumes 32 to 38 with the clerk of the court, to abide the further order of the court, appellee stipulating to take no further proceedings in the action of replevin, until the further order of the court.

1. *The court erred in disallowing credit for stereotyping.*

All the volumes in controversy, from 32 to 46, both

inclusive, were stereotyped by appellants. Both masters refused to allow credit for the cost of stereotyping. The first of our exceptions to the report of Mr. Bishop, and our fifteenth exception to the report of Mr. Bennett, present the question of stereotyping. All of the witnesses produced on either side, as to the question of stereotyping, with the exception of appellee himself, agree that the stereotyping of law reports is a measure of true economy. The advantage derived from stereotyping results from the fact that the publisher is thereby enabled to reproduce further editions, or reprints, from the stereotype plates, from time to time as demand may require, without again incurring the expense of composition. Both parties agree that the cost of stereotyping is 50 per cent. of the cost of composition. Thus, if the composition of a volume costs $500, the additional cost of stereotyping is $250, making the entire cost of the stereotype plates $750. All the witnesses, including Mr. Myers, agree that if the volume is not stereotyped, the publisher is necessarily obliged to expend a much larger sum in the first instance in paper and press work, in order to produce a sufficiently large edition from the type alone to supply all probable demand. The additional cost of this investment, with the interest thereon, will, in time, more than counterbalance the additional expense of stereotyping, if that process is employed. Stereotyping is thus found to be a measure of economy, and this process is uniformly employed in the production of law reports, including not only original editions, but re-edited or new editions, such as the volumes in question.

Upon this point JOHN MARDER, one of appellee's own witnesses, testifies, upon cross-examination, as follows (page 527):

"Q. Is it not true, as a rule, that most publishers prefer, in the long run, to stereotype their books, rather than to print them from the original type, without stereotyping, where the books are of the nature of law reports?

"A. That is invariably the case, I believe, now.

"Q. Is it not true that publishers find it to be economical in the long run, to stereotype law reports rather than print them from the type?

"A. Yes, sir."

CHARLES E. LEONARD, another of appellee's witnesses, testifies, on cross-examination, as follows (page 530):

"Q. Is it not true that in permanent publications, such as volumes of law reports, publishers usually find it cheaper, in the long run, to stereotype than not to stereotype?

"A. I think they do. The only law work I recollect having anything to do with that was not stereotyped was the Revised Statutes.

"Q. All other law reports have been?

"A. All others have been stereotyped or electrotyped."

ANDREW P. CALLAHAN testifies as follows (page 580):

"Q. State, if you know, what is the general usage and custom among law publishers in this country with reference to stereotyping law reports, either with the original editions, or reprinted, or new editions?

"A. I believe all the publishers now that I am acquainted with, stereotype the reports, and some of the houses even stereotype their text books, quite a number of them.

"Q. Do you mean they also stereotype new editions or reprints of reports?

"A. All that I know of, all the reprints with which I am familiar, made recently, have been stereotyped."

Being asked to state, from information derived from other publishers in the usual course of business, what re-

prints of law reports, in recent years, had been stereotyped, the witness testified as follows (page 580):

"A. Banks Brothers printed several volumes of Kentucky Reports, and stereotyped them.

"Q. When?

"A. About ten years ago. F. D. Linn & Co., of Jersey City, published several volumes of New Jersey Reports, and stereotyped them. Robert Clarke & Co. republished a large number of the Ohio and Ohio State Reports, and stereotyped them. Merrill, Field & Co., of Indianapolis, republished several of the Indiana Reports, and stereotyped them. West & Co., of St. Paul, reprinted the first eleven volumes of the Minnesota Reports, and stereotyped them. Mills & Co., of Des Moines, reprinted several of the Iowa Reports, and stereotyped them. Thomas & Wentworth, of St. Louis, and E. I. Jones & Co., of the same place, reprinted a large number of the Tennessee Reports, and stereotyped them. A. L. Bancroft, of San Francisco, and Sumner & Co., of the same place, reprinted many of the California Reports, and stereotyped them. In fact, I know of no reprint made in the last ten years of reports, that has not been stereotyped.

"Q. Have the reprints you have just mentioned been made of late years—say within eight or ten years past?

"A. All of them within eight or ten years past.

"Q. What has been the fact, as to Mr. Freeman stereotyping his reports?

"A. I am informed by Mr. Freeman that they are all stereotyped.

"Q. From 46 to the end of the series?

"A. From 46 to the end of the series.

"Q. State whether or not this stereotyping of law reports is or is not a matter of real economy to the publisher?

(Objected to.)

"A. I think it is, or it would not have been done.

"Q. Why do you regard it as a matter of economy?

"A. Because when the edition is exhausted, it saves the cost of resetting the type. If it cost $750 to make a volume of stereotype plates, that is, to set the type and

put it into permanent form in the shape of stereotype plates—

(Objected to.)

$250 of that $750 would be represented in the cost of stereotyping; the other $500, speaking in round numbers, would be the cost of setting the type. But in case the volume is not stereotyped, a larger number of volumes would have to be printed than in the case of stereotyping, in order to supply the demand for the book during the period the publisher thinks it necessary. The interest on the added material, the paper and the press work, which goes into this additional stock made necessary by the fact it is not stereotyped, would be in course of time almost equal to the cost of stereotyped plates; but when, in case of it not being stereotyped the edition would be exhausted, the publisher would have to submit to the original expense over again of setting the type, $500. That is the reason why I believe all publishers, so far as my knowledge of business extends, have adopted the mode of printing volumes of reports and stereotyping them."

Mr. Myers himself admits that he stereotyped all the volumes from 32 to 46, inclusive, when they were originally published (page 568). The plates of volumes 32 to 38, inclusive, and of volume 46, having been destroyed in the great fire of 1871, he reprinted volume 46 in 1876 and stereotyped it (page 569). After appellants had begun the publication of their volumes in controversy, in 1877, and but a few weeks prior to the filing of his original bill in this case, Mr. Myers reprinted volumes 37 and 38 and stereotyped them (page 556). In his testimony upon the question of stereotyping he attempts to break the force of the economical reasons shown by the other witnesses in favor of stereotyping, by stating that he stereotyped volumes 32 to 46 of the original edition as a mere matter of convenience in the furnishing of proof sheets to the judges for correction. He admits, however, that these consider-

ations could not, and did not, apply to his republication of volumes 37, 38 and 46, the two former of which he republished after some of our volumes in controversy had already appeared. Upon cross-examination he testified as follows (page 572):

"Q. When did you first become converted to this doctrine of not stereotyping your reports?

"A. About the time these books were being reproduced. I had talked with Baker of New York, and Gilbert of St. Louis, and various other parties, and they said new editions of state reports they would not stereotype, because it was only——"

(Objected to.)

We submit that Mr. Myers' conversion was at a somewhat later date than he specifies, since at the time of our publication he, himself, was reprinting and stereotyping volumes 37 and 38, and he did not publish them until several of our volumes in controversy had already appeared. And it is only when it becomes necessary to swell his damages in this cause that he endeavors to find reasons against stereotyping, in defiance of his own uniform practice and that of all other law publishers.

It is not the province of the court upon an accounting of this nature to reduce the legitimate expenditures incurred by appellants in producing their volumes to the lowest possible point, or to exclude any reasonable and proper elements of expenditure which entered into the production of their books. The true scope of the inquiry is, what reasonable expenses were incurred by appellants in the production of their volumes, in accordance with the usages and customs of the trade in the art of bookmaking as then existing. Their books being produced in the usual manner customary in such publications, and in the same general style and appearance as other law re-

ports, all legitimate expenditures incurred in such production should be allowed. If the cost of stereotyping is to be excluded, the court may, with equal propriety, reduce the cost of paper and binding, since a much cheaper article of paper and cheaper binding could have been employed, and still have rendered the books marketable. The true test, therefore, in measuring the expenditures which should be allowed to appellants as the cost of producing their volumes, is such reasonable expenditure as was customary and usual in the production of like publications during the period in controversy.

By way of further illustration, let us suppose that appellants had not stereotyped their books, and had erred in judgment as to the size of the edition necessary to supply the market. Between four and five hundred copies of some of these volumes were sold by them. Suppose that in printing these volumes from type alone, without stereotyping them, they had believed, as in the then condition of the market they might well have believed, that an edition of three hundred copies would have been adequate, and had printed only that number. This edition being exhausted, they would then be compelled to again incur the large expense of composition to produce the additional volumes necessary to supply the demand, and which they actually did sell, as shown by the proof, and for which appellee is now seeking to recover. In that event, upon Mr. Myers' own theory of non-stereotyping, our conceded expenditures would have been largely increased and his profits correspondingly diminished. Precisely this state of facts did occur with reference to one of these volumes, as to which, by some mistake as to the paper ordered for the volume, only a limited edition was first published. It became necessary, in

that instance, to reprint a second edition of this volume to meet the demand. In that instance, therefore, by reason of our stereotyping, appellee's damages are largely increased, while he yet seeks to disallow, as an item of credit, the expense of stereotyping, which in that case swells the total amount of damages to be recovered. We therefore submit, with confidence, that the court erred in overruling our exceptions to the reports of each of the masters based upon their disallowance of the cost of stereotyping.

2. *Appellants' salaries should have been allowed as part of the expense of conducting their business.*

The second and third of appellants' exceptions to Mr. Bishop's report, and their eighth and sixteenth exceptions to Mr. Bennett's report present the question of the right of appellants to a credit for the amount paid the different members of the firm on account of their services, as a part of the expense of conducting their business.

Objection was made in the court below that it did not appear that these payments were actual salaries to the members of the firm, the language used in their articles of copartnership being that they should draw specified sums for their expenses. Mr. Bennett thereupon reached the remarkable conclusion, notwithstanding the direct testimony of appellants, and of their bookkeeper to the contrary, that the amounts thus paid were a division of profits, and not an adjustment of salaries. The amounts drawn by appellants were about $12,000 a year during the period in controversy. Their bookkeeper testified that he was instructed by the firm to charge these sums to them upon the books as salaries; that they were so charged, and that when additional amounts were drawn by members of the firm, such

additional sums were charged to them as over-drafts, and were not treated as a part of their salaries. We do not, however, insist that the mere fact that these sums were called salaries, and were so entered upon the books, makes them salaries. Whatever the method of bookkeeping may have been, the conceded fact remains that appellants who drew out these sums of money were all actually engaged in the conduct of their business during this entire period, and that they had a long and intimate experience with the business of law publishing (page 558). Their entire time and energies were devoted to the prosecution of their business, and it is a legitimate presumption that the sales of these volumes were largely increased by reason of such services. It also appears in evidence, and has never been disputed, that if these services had not been rendered by appellants, they would have been compelled to employ other competent persons to transact the business (page 558). In that event, the amounts paid to appellants, by whatever name they are called, would necessarily have been paid to the persons thus employed to take their place in the management of the business, and it is conceded that the expenses of employes are a legitimate item to enter into the expense account.

It is not disputed that the services of appellants were rendered; that they conduced to the success of their business and to the large sale of these books; that without such services, other and equally competent men must have been employed to do the same work, and it is also undisputed in the entire record, save only in the report of Mr. Bennett, that no profits were ever divided by the firm. The case is therefore brought directly within the doctrine of the *Rubber Company* v. *Goodyear*, 9 Wall., 788, the only distinction being that in that case the salaries

allowed were paid to the managing officers of an infringing corporation, instead of to the members of a partnership. Mr. Justice SWAYNE, delivering the opinion of the court, says (page 802):

"In making up the account, the master allowed deductions from profits for bad debts, for rents, and interest paid, debiting rents and interest received. He allowed for the market value of the materials on hand when the infringement began, for the cost of those acquired afterwards to carry on the business, and for the usual salaries of the managing officers. * * * He refused to allow the extraordinary salaries, which it appeared by the books had been paid, being satisfied they were dividends of profits under another name, and put in that guise for concealment and delusion."

The master's findings, including the salaries allowed, were all approved by this court. Mr. Justice SWAYNE further says (page 804):

"The profits made in violation of the rights of the complainants, in this class of cases, within the meaning of the law, are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost, the elements of price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and bad debts are to be taken into the account, and usually nothing else. The calculation is to be made as a manufacturer calculates the profits of his business. 'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into the account. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression."

The inconsistency of the finding that the amounts paid the partners were a division of profits, instead of salaries,

is still further shown in the fact that these payments bore no proportion to the respective interests of the partners in the firm, as they would have done had they been a division of profits. Thus, the interest of each in the business, and the amount drawn by each, were as follows:

Bernard Callaghan, 3-10 interest.....	$3,000	salary.
Andrew Callaghan, 3-10 interest.....	3,000	"
A. P. Callahan, 3-10 interest.....	4,000	"
S. A. Clark, 1-10 interest.....	2,500	"

3. *The number of copies sold.*

There is no controversy as to the number of copies of volumes 32 to 38 which were sold by appellants, appellee conceding the correctness of the statement prepared by James E. Callaghan as to the sales of these volumes. The only dispute as to the number of copies sold relates to volumes 39 to 46. The first four exceptions taken by appellants to Mr. Bennett's report and overruled by the court relate to the question of the number of volumes sold, and will be considered together.

Mr. Bennett finds that appellants sold 2,292 copies of volumes 39 to 46, and that they substantially admit the sale of 2,260 copies. These findings are wholly unwarranted by the proof, and we have never admitted the sale of the number claimed by Mr. Bennett. We do admit the sale of 1,990 copies as shown in the second column of Exhibit "1" (page 677), to the testimony of James E. Callaghan, taken before Mr. Bennett, and 199 copies, as shown in Exhibit "3" (page 678) of James E. Callaghan's testimony before Mr. Bennett, making an aggregate of 2,189 copies, whose sale is admitted by appellants. The mistake of the master, which was confirmed by the court, in charging us with a larger number of

copies than were actually sold, results from his allowance of sales claimed by Mr. Clement, appellee's expert who examined our books, to have been made after March 9, 1881.

On the 9th of March, 1881, counsel for appellee having argued his motion for a temporary injunction upon the supplemental bill as to volumes 39 to 46, excluding 40, Judge Drummond, without waiting to hear from counsel for appellants, stated from the bench that appellee upon his own showing, had not made out a sufficient case for an injunction, if appellants would enter into an undertaking to report their sales to appellee. Appellants then stated in open court that they would prefer not to sell at all during the litigation, rather than to report their sales to Mr. Myers. At the suggestion of Judge Drummond appellants thereupon voluntarily stipulated as follows (page 43): "That until the hearing of the case in this court, "they will not sell, deliver or remove, except from the "bindery to their store, volumes 39, 41, 42, 43, 44, 45 "and 46 of the Illinois Reports published by them, with "leave, however, to either party to apply to the court, if "they shall be so advised, for a modification of this or- "der." Immediately, and upon the same day, the printed stock of these volumes in appellants' store was taken from the shelves, nailed up in boxes, and stored in the basement, and the unbound sheets were also stored away (pages 619, 621, 627). Strict instructions were immediately given to all of their employes to sell none of these volumes. Appellants testified that none of these volumes were afterwards sold, and that whatever copies of volumes 39 to 46 were sold thereafter, were either second-hand copies of their own and of Myers' edition, or new copies of Myers' edition, which they were compelled to purchase

from him to supply their customers (pages 621, 627, 628). Mr. Bennett very properly found that as to 156 copies shown by appellee's expert, Mr. Clement, to have been sold after March 9, 1881, the copies being second-hand, or resales, appellee was not entitled to recover. His only mistake upon that point was in not excluding all sales claimed by Mr. Clement as having been made between March 9, 1881, and April, 1884, when he examined our books and testified before the master. Two hundred copies sold during the years 1881, 1882, 1883 and 1884, are still treated by Mr. Bennett as original sales of new copies, and charged against us in his report. The proof is overwhelming that not a solitary copy of volumes 39 to 46 was sold by appellants as an original sale after March 9, 1881. It is true that after that date they did purchase in the usual course of their trade, copies of these volumes, which they had previously sold, and which previous sales are accounted for by James E. Callaghan in his exhibit, and for which the master charges us. They also purchased many copies of Mr. Myers' own edition, from time to time, after March 9, 1881, and with the second-hand copies of their own edition, thus repurchased from their customers, and the copies of Mr. Myers' edition thus purchased from him, they supplied their customers after the stipulation of March 9, 1881 (pages 621, 628). The mistake of the master, therefore, was in not excluding from the accounting all the volumes sold after March 9, 1881, instead of excluding only 156 copies, and our exceptions upon this point should have been sustained.

The injustice of the decree affirming the findings of Mr. Bennett upon this point will be more apparent when the court is reminded that Mr. Clement, Myers' expert, whose figures as to the number of copies sold are adopted by the

master and by the court, himself admits that he has charged us, including the volumes remaining on hand, for the sale of more copies of volumes 39 to 46 than were actually printed, (see Clement's Exhibit A, page 679). Upon this point Mr. Clement upon cross-examination, testified (page 610), as follows:

"Q. Under the column headed 'total number sold as appears on C. & Co.'s books,' you got the aggregate of all the copies sold from 39 to 46 at 2,511, and under the column headed 'number on hand' the aggregate of all copies on hand, 1,562?

"A. Yes, sir.

"Q. Will you state how many that makes in all, as you computed it, of those sold and those on hand?

"A. 4,073.

"Q. Under the column of your exhibit headed 'number printed,' you got the aggregate of all the copies printed, as 3,822?

"A. Yes sir.

"Q. Does not your exhibit, then, show that there were more copies of volumes 39 to 46 sold by Callaghan & Company than were printed by them?

"A. My exhibit shows that there were more sales I took off the books, than the number of volumes I found printed on their memoranda book.

"Q. How many more?

"A. 251."

No argument of counsel can emphasize the gross injustice of the decree upon this point. It is only equalled by the fact that the court, in affirming the master's finding, based upon Mr. Clement's figures, has also charged us for copies of Myers' own edition of volume 40, which were purchased of him and sold during the period in controversy. Upon this point Mr. Clement testifies (page 612), as follows:

"Q. Your exhibit shows 450 copies of volume 40 as printed by the defendants, and 50 copies of volume 40 as sold by them and 446 on hand; is that correct?

"A. Yes, sir; that is right.

"Q. How do you explain the fact that your exhibit shows a much larger number of copies of volume 40 sold than the difference between those printed and those on hand?

"A. The fifty volumes of volume 40 were sold, as their sales books show.

"Q. Is that the only explanation you can give?

"A. Yes, sir."

The conceded fact is that volume 40 was printed by Callaghan & Company, but never published or sold, and that only four copies ever went into circulation by gift or otherwise. Yet Mr. Clement charges us for the sales of fifty copies of volume 40, while he admits that we only printed 450 copies of this volume and that he found 446 copies on hand when he made his examination at the store. This would leave forty-six copies of Myers' volume 40, which, as testified to by Mr. Flood, one of the firm of Callaghan & Company, were purchased from Mr. Myers himself (page 621), and sold to the customers of Callaghan & Company, and yet, under the decree of the court, we are actually compelled again to pay tribute to Mr. Myers for these forty-six copies of his own edition, for which he has once been paid in full. The only excuse possible for so grave an error upon the part of the court below is that in the voluminous record the point was doubtless overlooked and the argument upon that point forgotten by that court in making up its opinion.

4. *The selling price of the volumes.*

The fifth and sixth exceptions taken by appellants to Mr. Bennett's report and overruled by the court, question the correctness of his findings that the average price per volume received by appellants was $4.46 instead of $4.34,

and that the total gross receipts from the sales were $10,231.48.

It is conceded that but few of the volumes in controversy were sold separately, by far the larger number having been sold in complete sets of Illinois Reports or in connection with other books. When sales were made separately they so appear upon the sales-books. When the volumes were sold in sets of Illinois Reports, or in connection with other books, the sales books only show the aggregate price received for the entire sale. It is, therefore, impossible to determine with absolute exactness the amount received by appellants for the sales of the volumes sold as parts of sets, or in connection with other law books. In all such cases, which constitute by far the larger number of the sales in controversy, it is conceded by both parties that some method or theory of computation must be used to approximate a correct result. The only controversy, therefore, upon this branch of the case, is as to which theory more nearly approximates correctness.

Appellee proved isolated sales of seven or eight copies in all of volumes 32 to 38, at prices ranging from $5 to $7.50, and insisted that the average selling price drawn from this limited number of sales should be applied to the 2,909 copies of these volumes which we admit, and which Mr. Bishop finds were sold. Appellee also adopted substantially the same means of fixing the average selling price of volumes 39 to 46.

The method adopted by our expert, James E. Callaghan, in fixing the average selling price at $4.34, is as follows: Wherever copies were sold separately, he gives them at the exact selling price. This includes the isolated sales proven by appellee. Wherever the volumes were

sold in complete sets of Illinois Reports, he deducts the cost of the Freeman volumes, so called, being volumes 47 to the end of the series, inclusive (page 538). These were the absolute property of Mr. Freeman, who fixed his own price to the trade, until the price was fixed by an act of the legislature shortly before this controversy began. The price of the Freeman volumes, from 47 to 80, was $3.50, with the exception of volumes 73 and 74, which was $2.25, and the price, after volume 80 to the end of the series, was always $2.25 (page 539). When, therefore, the volumes in controversy were sold in sets, our expert takes from the gross selling price the Freeman volumes at the rates above mentioned, the balance representing the selling price of the first forty-six volumes in the set. He then divides this balance by forty-six to find the average selling price of the volumes in controversy.

We confidently submit that this method of fixing the selling price is not only fair but even generous to appellee. volumes 1 to 31, inclusive, were owned by Callaghan & Company, and when sold alone brought much larger prices than the average thus fixed, selling in sets of 1 to 31 at $5, and when sold separately at $6 to $7.50 per volume. The printed stock of these volumes was small; they were not stereotyped; and the state of the market established a larger price for these volumes than for volumes 32 to 46 (page 629). But by the method of computation thus adopted, our volumes 1 to 31, although limited in stock and not stereotyped, were put upon the same basis with volumes 32 to 46. Mr. Myers thus obtains much larger damages on the sales of volumes 32 to 46 than Callaghan & Company in fact realized upon their sales.

Again, it appears in evidence that the sales of many, if not most, of the complete sets were made in advance of the publication of the volumes in dispute. In all such cases appellants delivered to the purchasers such volumes of the set as they had in stock, with the agreement to deliver the remaining volumes, being those in controversy, as fast as they were published. In these cases the purchasers insisted upon retaining in their hands a sufficient amount of the gross selling price for the entire set to insure the delivery of the volumes not yet published, and to amply protect themselves (page 629). The amounts thus deducted, generally by the arbitrary dictation of the purchasers, were often as high as $5, $6 and $7 per volume, and in one instance, stated in the testimony of Mr. Clark, (page 632), $100 was held back for eleven volumes, being at the rate of over $9 per volume. In all these cases, when the volumes held back were subsequently published and delivered to the purchasers, they were again entered upon the sales book as sold at the price thus arbitrarily withheld by the purchaser, being at a much higher price than if the sale had been completed in the first instance. Mr. James E. Callaghan, in making up his exhibit of the volumes sold, and the prices at which they were sold, gives the figures in these cases just as they appear in the final entry upon the sales books, thereby charging appellants with having received a much larger sum by reason of the arbitrary amount so held back by the purchasers, than was actually received. In other words, in many instances, by reason of our method of computation, Mr. Myers gets the benefit of sales at $5, $6 and $7 per volume, and in one instance at over $9 per volume, when, in fact, we received a much smaller amount for the volumes thus sold.

Again, the average selling price contended for by appellee, being based upon a limited number of sales of less than a dozen volumes, does not embrace sufficient data to entitle it to any weight. Mr. Bennett attempted to harmonize both theories by finding neither entitled to credence, and by splitting the difference between the two, in which finding he was sustained by the court. His finding, therefore, should be reduced to $4.34 per volume, if the court shall hold that the method of computation adopted by Mr. James E. Callaghan is more nearly correct than that of Mr. Clement. And applying this average price to the number of copies sold, as shown by Exhibits 1 and 3 (pages 677, 678) to Mr. Callaghan's testimony, Mr. Bennett's report should have been corrected by reducing the total gross receipts from $10,231.48, to $9,459.37, being the $8,648.97 shown in Exhibit 1 of James E. Callaghan's testimony, and the $810.40 shown in Exhibit 3 of the same testimony, and the decree should accordingly be reversed in this respect. "Actual, not possible, gains," as was stated by this court in *Rubber Company* v. *Goodyear*, 9 Wall. 788, is the rule of damages in this class of cases.

Nor has appellee, by the testimony of Mr. Clement, furnished sufficient evidence of separate sales of volumes 39 to 46, to warrant the adoption of the average price claimed upon the basis of such isolated sales. Mr. Clement only shows separate sales of 394 copies. This includes all separate sales by Callaghan & Company of second-hand copies of their own edition, and of copies of Mr. Myers' edition. Mr. Clement seeks to charge us for sales of over 2,500 copies. About 2,100 copies are thus admitted by him to have been sold in sets. His generalization, therefore, is not sufficiently broad, nor his number of separate

sales sufficiently large, to justify the average fixed by him, even aside from the overwhelming testimony that no such average was received. And the identical sales of separate volumes, upon which Mr. Clement bases his average, are included in the account of sales rendered by James E. Callaghan, and form a part of the basis for the average selling price fixed by him. The case is clearly distinguishable from *Mason* v. *Graham*, 23 Wall., 261, since in that case there were 414 separate sales of the infringing articles, and only 297 "lump sales," so-called. In that case, therefore, the separate sales proven were so largely in excess of the "lump sales," that the court was justified in fixing the average upon the former, rather than upon the latter; while in this case exactly the reverse is true.

5. *The court erred in distributing the cost of production over the volumes sold and unsold.*

Our seventh exception to Mr. Bennett's report questioned his finding the known cost of all volumes sold to be $4,679.55, the actual cost being very largely in excess of this amount.

Mr. Bennett's error upon this point was due in part to his disallowing the stereotyping, a point already considered; in part to his disallowing the editorial work, hereafter to be considered; and in part to his distributing the expenses of publication, which he did allow, over all the volumes sold and unsold, the latter question being also presented by our thirteenth exception. The question of the distribution of the expenses of publication is therefore one of importance now to be considered.

Appellants contend, and Mr. Bishop so found, that they should first be reimbursed all expenses of publication, be-

fore they can be charged with having earned any profits. In other words, they insist that their profits must be estimated precisely as all merchants and manufacturers estimate their profits, by deducting all known elements of fixed cost of production, plus the expenses of sales, and that until they have been fully reimbursed as to these elements they have earned no profits, and appellee is entitled to no damages. Appellee's position upon this branch of the case is, in substance, that the volumes unsold must bear their proportion of the expense of production, unless we shall deliver them over to him.

By the final decree we are forever enjoined from selling any of the volumes from 32 to 46, inclusive, and from selling the stereotype plates. The decree has thus deprived these volumes of all commercial value, and their worth, as articles of merchandise, is practically annihilated. Indeed, the only object in contesting the claim of appellee to the possession of the volumes was the hope, confidently entertained by appellants, that the decree might be reversed upon an appeal, in which event they might continue the sales of these volumes. The stereotype plates and volumes unsold, being thus stripped of all commercial value by the decree obtained at the instance of appellee, he cannot now be permitted to assert, for the purposes of the accounting, and in order to swell his recovery, that the unsold volumes have a commercial value exactly equal to that of the volumes which have been sold. Yet this is precisely the position for which he contended in the court below, and which was sustained by that court. By way of illustration it is pertinent to inquire whether, in the event of appellee having filed his bill and obtained a perpetual injunction against the sale of these volumes, before a single copy had been sold, or when but

ten copies had been sold, he could have recovered any profits. In that event it is apparent, without argument, that the expenses of production not having been repaid to appellants, no profits would have been earned and no money recovery could have been had. Until, therefore, the income from sales equals the outlay for production, no profits have been earned, and none can be recovered. The moment that point is reached in the sales of the volumes, appellee's damages begin to accrue, and thereafter increase in a constantly accelerating ratio.

Nor is it any answer to this position to say, as Mr. Bennett says in his report: "The rule contended for on "behalf of defendants would place it in the power of the "infringer to constantly keep the expense account of the "infringer in excess of profits upon sales made, and thus "always defeat a recovery of damages." This would simply be a mathematical impossibility, since if the sales are not enjoined, it is only a question of time when the expenses of production will be reimbursed by the proceeds of sales, and the proceeds of all sales thereafter will be net profits, less only the necessary expenses of selling. The fact that Mr. Bishop, who adopted our theory upon this point, still found the sum of $6,986.05 due to appellee, sufficiently demonstrates the fallacy of Mr. Bennett's conclusions upon this point, which were adopted by the court in its opinion, and embodied in the final decree.

Our eighth exception to Mr. Bennett's report challenged his finding a credit of only $1,118.49, on account of the expenses of appellants in conducting their business, being at the rate of only 12 per cent. of their gross sales, while the proof shows that they are entitled to a credit of 17 per cent. of their gross sales on account of such expenses. Mr. Bennett's error upon this point grew

out of his disallowance of the salaries paid to appellants, a point which has been already fully discussed.

Our ninth exception to his report, questioned his finding that the total cost of producing the volumes sold was only $5,798.04. His error upon this point grew out of his disallowance of the cost of stereotyping, already considered; his disallowance of the compensation paid to editors, hereafter to be considered; his distribution of the expenses of publication over all the volumes sold and unsold, and his disallowance of the salaries as a part of the expenses, already considered.

For the reasons above given, therefore, the seventh, eighth and ninth exceptions taken by appellants to the report of Mr. Bennett, should have been sustained, and for the error in overruling these exceptions the decree should be reversed.

6. *No net receipts or profits on sales of volumes 39 to 46.*

Our tenth and eleventh exceptions to Mr. Bennett's report questioned his finding that the net receipts on sales were $4,433.44, for which amount he recommended a decree, whereas it appears by the proof that there were no net receipts or profits, the expenses of producing the volumes being largely in excess of the gross receipts.

The total cost to appellants of producing and selling volumes 39 to 46, excluding volume 40, was, as shown by "Exhibit 1" of James E. Callaghan's testimony before Mr. Bennett, $13,514.36 (page 677). The total receipts upon the sale of these volumes were $8,648.97, as shown on the same exhibit, and $810.41 as shown on James E. Callaghan's "Exhibit 3" (page 678), making

the aggregate receipts $9,459.38. The expenses of production and sale thus exceeded the gross receipts by $4,054.98. In other words, when appellants were stopped, by the decree, from selling these volumes, they had expended $4,052.98 more than they had received upon the entire enterprise. So far, therefore, from having realized any profits, they actually lost by the publication an amount almost equal to the sum which Mr. Bennett found they made as profits, and for which he recommended and the court awarded a decree.

Had Mr. Bennett allowed us credit for the cost of production, before charging us with any profits, as Mr. Bishop did, even disallowing, as both masters did, credit for the stereotyping and editorial work, the expenses of production and sale, even allowing us but twelve per cent. for expenses of selling, would still have exeeeded our gross receipts from sales. The editorial work on volumes 39 and 41 to 46, as shown by "Exhibit 1" of James E. Callaghan's deposition, cost us $2,274.58. Estimating the expenses of stereotyping alone, without changes or corrections in the plates, at $250 per volume, the cost of stereotyping the seven volumes would have been $1,750. The two items aggregate $4,024.58. Upon this basis, even if Mr. Bennett had been justified in disallowing the cost of stereotyping, of editorial work, and of salaries paid to the firm, there would still have been a net loss to appellants by the enterprise of $30.40. Either or both of the items for stereotyping and editorial work may, therefore, for the sake of the argument, be excluded from the accounting, and still no profits have been earned, the gross receipts being still less than the gross expenditures. The absolute injustice of Mr. Bennett's report and of the decree upon this point cannot be better emphasized than by

this simple analysis of the figures. Our tenth and eleventh exceptions to the report of Mr. Bennett should therefore have been sustained, and no money decree should have been allowed upon the supplemental bill, since no profits were realized by appellants from the sale of volumes 39 to 46.

Our twelfth exception to Mr. Bennett's report in allowing a recovery for 200 copies sold during the years 1881, 1882, 1883 and 1884, when in fact only second-hand copies of the Myers' and of our edition and new copies of the Myers' edition, purchased from him, were sold after March 9, 1881, has already been fully considered. The same is true of the thirteenth exception, based upon the refusal of the master to allow appellants credit for the cost of producing the unsold volumes.

7. *The court erred in refusing credit to appellants for editorial work on their volumes.*

Our fourteenth exception to the report of Mr. Bennett was based upon his refusal to allow us credit for the sums expended in editorial work upon these volumes, as a part of the legitimate cost of their production.

$2,274.58 was paid by appellants for editorial work in producing volumes 39 to 46, exclusive of volume 40. See "Exhibit 1" of James E. Callaghan (page 677). This is at the rate of a little over $300 per volume. Nearly all of this editorial work was performed by Mr. Denslow, who spent over sixteen months in editing these volumes. A small amount of work was done by Mr. Ewell, Mr. North and Judge Bailey, but all of their work upon the statements of cases and arguments of counsel was discarded and not used. All of the statements of fact and abstracts of briefs

of counsel contained in these volumes is the work of Mr. Denslow. He states, in his testimony, that this work was done entirely from the original records of the Supreme court at Ottawa, Springfield and Mt. Vernon. The only matter which he took from the Freeman volumes was the opinions of the judges, which are conceded to be common property, and in a few cases where Mr. Freeman had, in the original edition, copied a document, such as an instruction to a jury, Mr. Denslow treated such document as public property, like the opinions, and copied it from the Freeman edition, and then corrected it by comparison with the original on file.

As appears from his opinion, Judge Drummond found that the great bulk of the editorial work was new and original work done from the original sources, and that the use of the Freeman volumes was comparatively slight, and the infringement merely technical, most evidences of similarity being too trivial to warrant notice (page 63). Even without this recognition by the learned judge of the large amount of original editorial labor put upon these volumes, and without the unchallenged testimony of Mr. Denslow as to the extent of his work from the original sources, the books themselves bear indisputable evidence on almost every page that they are the result of original and independent literary labor. Hundreds of cases, as originally reported by Mr. Freeman, contain no statements of fact, or arguments of counsel, the opinion being simply prefaced with the statement that the facts are stated in the opinion. The corresponding cases in the Callaghan edition, as edited by Mr. Denslow, contain elaborate statements of fact, and copious abstracts of the arguments of counsel. Elaborate foot-notes are also added with references to other cases in Illinois and

elsewhere upon the topic under consideration in the given case. All this work, it is conceded, was original and independent labor on the part of Mr. Denslow. It was not copied from the Freeman edition, and it is not in that edition. The editorial work thus put upon these volumes includes the proof-reading, which is itself an important item and as necessary to the production of the manufactured product as are composition, press work or binding. The proofs of a volume of law reports must be read by a skillful lawyer with some experience in work of this nature, or the result will be a bungling and unmarketable production, in fact a mere comedy of errors. And every objection which is urged against the allowance of the cost of editorial work and proof-reading may be urged with equal and even greater propriety against the mere mechanical labor of composition, press work and binding.

The experience of the court in consulting new editions of law reports will have shown that the uniform usage is to reëdit such reports by the addition of new and valuable matter, precisely as was done by Mr. Denslow in this case. That the volumes, when thus reëdited, have an additional market value, as compared with the originals, is sufficiently demonstrated by the extent and uniformity of this usage. Nor can it be doubted that the volumes of Mr. Denslow, with full and exhaustive statements of fact, and abstracts of arguments of counsel, in hundreds of cases where they are wholly omitted in the Freeman volumes, had an additional commercial value in the market as compared with the Freeman volumes, and that this additional value largely contributed to swell the sales of appellants' volumes. The refusal, therefore, to allow them credit for this expenditure, like the refusal to allow them the expense of stereotyping, is an effort by

indirection to inflict upon them punitive damages largely in excess of their actual profits. The recovery in this class of cases proceeds upon the theory that the infringer is a trustee for the owner of the copyright, and must account for all profits actually made in the execution of the trust. This principle underlies all the adjudicated cases in which recoveries have been had for infringements of patents and of copyrights. But in cases where an accounting is sought against a trustee under a technical trust, he is allowed credit for all reasonable and customary expenditures in and about the furtherance of his trust. Hence the expenses incurred by appellants on account of editorial work and proof-reading, like their expenses for stereotyping, being necessary and reasonable in themselves, and in accordance with the universal usage and custom pertaining to like publications, should be allowed, as a necessary part of the expenses of producing the infringing volumes. Our fourteenth exception to Mr. Bennett's report should therefore have been sustained.

Our fifteenth exception to the report of Mr. Bennett, relating to stereotyping, the sixteenth exception, relating to the expense account, and the seventeenth exception, relating to the nature of Mr. Denslow's editoral services, have been sufficiently considered in the preceding pages.

8. *The 156 copies of re-sales.*

Mr. Bennett, in his report, admitted the re-sale of 156 copies of the volumes between 39 and 46, for which he very properly found that appellants were not chargeable in the accounting, for the reason, as stated in his report (page 71), that the damages arising to Myers for a single sale only of the same volume should be charged against Callaghan & Company. Appellee excepted to

this branch of the report, and his exceptions were sustained by Judge Blodgett, and the decree actually awarded damages against Callaghan & Company for the 156 copies of re-sales, and upon this we have assigned error.

The proposition that appellants are chargeable with profits on volumes which they purchased at second hand and re-sold, after they had once paid tribute in the accounting upon the original sale, is so startling as to scarcely merit serious or extended discussion. If appellee is entitled to recover for such re-sales, it must be upon an independent right of action, as to these volumes alone, wholly aside from the question of infringement. The fact that the court has charged us with literary piracy in the original production of these volumes, does not make us pirates for all time to come, and for all future transactions, nor does it justify that species of judicial piracy which is perpetrated by this branch of the decree.

When we have once paid the penalty of the original transgression, by the accounting for the first sales, the volumes so sold are, by virtue of such accounting, freed from the monopoly of appellee's alleged copyright, and become common property. The decree for the accounting, in other words, operates precisely as a license to sell upon a fixed royalty. The recovery for the original sales satisfies the monopoly claimed by appellee under the act of Congress, and forever frees the volumes from any further claim upon his part. The decree fixing damages for the original sales, puts us precisely in the attitude of purchasers of the volumes in question. They then become our absolute property, to be sold and resold for all time to come. When, therefore, appellants account for the original sales of their edition, repurchase the volumes

in the market, and sell them at second-hand, or when they purchase from appellee copies of his own edition, or purchase them at second-hand from other parties, and sell them to their customers, the volumes are, by the accounting in the one case and by the purchase in the other, freed from the monopoly of the copyright, and may be sold and resold without further liability.

Perigo v. *Spaulding*, 12 Official Gazette, 352; (S. C.) 13 Blatchf., 259.
Adams v. *Burke*, 17 Wall., 453.

Nor is it any answer to say that a resale by appellants of second-hand copies of their edition, is as injurious to appellee as the original sale, because it supplies a demand that would otherwise be supplied by him. This argument, if well founded, would apply with equal force to resales by appellants or by other persons, of second-hand copies of Myers' own volumes. Every person selling at second-hand a copy of his books, would thus become liable to an action for infringement, although his monopoly had been fully discharged by the first sale.

The court need hardly read between the lines of this voluminous record to discover that this litigation is an effort, upon the part of appellee, to repair his fortunes at the expense of a business rival. And the rule of damages contended for by appellee in the court below, and allowed by that court, is rather one of confiscation and punishment than of just compensation. The court, by its decree, seems to have conceived that the problem for its solution was to administer appropriate discipline and punishment to Callaghan & Company, for their alleged literary piracy of appellee's wares. And all this was done, notwithstanding Myers had quietly folded his arms and acquiesced in the publication of volumes 32 to 38,

for a period of six months, as the volumes appeared, with full knowledge upon his part of all the facts, and of the large expenditure incurred by appellants, before filing his bill or uttering a word of warning. These considerations are pertinent to the inquiry whether the damages shall be punitive, or be limited to the actual profits realized. Indeed, the court has no jurisdiction to award punitive damages in this form of action, its power being limited to the allowance of profits only.

Chapman v. *Ferry*, 14 Chicago Legal News, 370; 12 Fed. Rep., 693.

Livingston v. *Woodworth*, 15 How., 546.

And the case is not one where the conduct of appellee has been such as to warrant any intendment, indulgence or presumption in his favor.

Respectfully submitted.

J. L. High,

Counsel for Appellants.

Chicago, October, 1888.